U.S. Department of Labor

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Issue Date: 17 March 2003

CASE NO.: 1997-MSP-9- P

In the Matter of

JAMES R. ZAPPALA, JOHN R. ZAPPALA AND SAMUEL C. ZAPPALA, Individually and as partners in a partnership d/b/a ZAPPALA FARMS

and

NEMIAS PEREZ- ROBLERO Farm Labor Contractor

Respondents¹

APPEARANCES: Mr. Joseph E. Wallen, Attorney

For Respondent Zappalla Farms

Mr. Nemias Perez. Pro Se²

Mr. John G. Campbell, Attorney

For the Administrator, U.S. Department of Labor

BEFORE: Richard T. Stansell-Gamm

Administrative Law Judge

DECISION AND ORDER

This case arises under the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA" or "Act"), Title 29, United States Code, Sections 1801 to 1872, as implemented by 29 C.F.R. Part 500. One of the purposes of the MSPA is to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations and agricultural employers. At this time,

¹Due to the Administrative Review Board's affirmation of the portion of my Preliminary Decision and Order on Partial Findings that reversed the Administrator's assessment of civil monetary penalties against DeMay Labor based on alleged violations of the Act, DeMay Labor is no longer a Respondent in this case.

²In the prior hearings of 1997 and 1999, Mr. Perez had been represented by Mr. Steven Ward Williams. Prior to the March 2002 hearing, Mr. Williams withdrew as Mr. Perez's attorney.

the parties in this case include two, separately named Respondents, and the Secretary of Labor ("Secretary"), through the Regional Administrator ("Administrator"), Wage and Hour Division, U.S. Department of Labor ("DOL"), as the Plaintiff.

Background and Procedural History

Administrator's Action

On July 5, 1995, three migrant farm workers were killed and several other laborers were seriously injured in a tragic van accident. After an investigation of the circumstances surrounding the accident, the Administrator cited Zappalla Farms for alleged violations of the Act and charged Mr. James R. Zappalla, Mr. John R. Zappalla, and Mr. Samuel C. Zappalla, individually and as a partnership doing business as Zappalla Farms, a \$18,200 penalty.³ These cited violations included unsafe and unhealthy migrant worker housing, unsafe transport vehicles for migrant workers, and use of Mr. Perez, without confirming his proper registration.

The Administrator also charged Mr. Nemias Perez-Roblero ("Mr. Nemias Peez") for violations of the Act. He was fined \$18,400⁴ for failing to provide safe and healthy migrant worker housing and safe transport vehicles. In addition, Mr. Perez transported migrant workers without proper authorization and engaged two persons to perform farm labor contracting activities without determining their possession of registration certificates. Finally, Mr. Perez transported and housed migrant workers without a current certificate of registration.

September 1997 Proceedings

Following the timely requests for a hearing by the Respondents (Zappalla Farms, DeMay Labor, and Mr. Perez) concerning the Administrator's determinations, Administrative Law Judge George P. Morin opened a hearing in Oswego, New York on September 8, 1997. On the third day of the hearing, as the parties experienced difficulty in obtaining full access to witnesses who were plaintiffs in a civil lawsuit against the Respondents in this case, Judge Morin continued the proceedings until the resolution of a Federal civil lawsuit.

June 1999 Proceedings and Preliminary Decision and Order on Partial Findings

Due to Judge Morin's subsequent retirement, I received this case and informed the parties on

³The initial assessment letter, dated August 16, 1995, levied penalties totaling \$20,200 (AD 44). At the June 1999 hearing, a representative for the Administrator noted the amount of the assessment had been reduced by \$2,000 (June 1999 hearing transcript, pages 962 and 963).

⁴The initial assessment letter, dated August 16, 1995, levied penalties totaling \$21,400 (AD 43). A representative for the Administrator noted the amount of one assessments had subsequently been reduced by \$3,000, making the total penalty \$18,400 (June 1999 hearing transcript, page 956).

August 11, 1998 that the case had been reassigned (ALJ I).⁵ On December 19, 1998, U.S. District Court Judge Gustave J. DiBianco approved a settlement agreement resolving the civil lawsuit (ALJ II). Upon receiving notice of the settlement, and following proper notice, I eventually resumed the hearing in Oswego, New York on June 2, 1999 (ALJ III and ALJ IV). At that time, Mr. Wallen and Mr. Campbell were present. Mr. Steven Ward Williams also made a brief appearance at the hearing on behalf of Mr. Nemias Perez who was not present.⁶

At the close of the Administrator's case, on June 3, 1999, Zappalla Farms and another then-named respondent, DeMay Labor, requested that they be dismissed as respondents in this case. On April 3, 2001, I issued a Preliminary Decision and Order on Partial Findings - Modifying in part and Reversing. In my decision and order, I directed that the assessment of Civil Monetary Penalty, date August 16, 1995, against Zappalla Farms be modified in part as by reversing "the determination that ZAPPALLA FARMS violated the Act as stated in Violation Number 16 b ('the FLC housed workers in a dwelling not listed in his HA document')." I also reversed the assessment of civil monetary penalties against DEMAY LABOR, which had been named as a farm labor contractor.

ARB Determination on Preliminary Decision and Order on Partial Findings

For diverse reasons, each party to the proceeding appealed my Preliminary Decision and Order to the Administrative Review Board ("ARB"). On August 29, 2001, despite the numerous objections, the ARB upheld my determinations concerning DeMay Labor, which effectively dismissed that farm labor contractor as a respondent in this case. Additionally, pending the ARB consideration, the Administrator withdrew its appeal of my finding concerning Violation Number 6b against Zappalla Farms.

March 2002 Proceedings

Pursuant to a Notice of Hearing and Continuance Order (ALJ C and ALJ E), I again resumed the hearing in this case on March 26, 2002 in Pulaski, New York. Prior to the hearing, on September

⁵The following notations appear in this decision to identify evidence: AD - Administrator or plaintiff exhibit; ZX - Zappalla Farms exhibit; PX - Perez exhibit; DX - DeMay Labor exhibit; TR (Transcript for the 1997 and 1999 hearings; the page numbers run consecutively); and ALJ - administrative law judge exhibit.

⁶Mr. Williams arrived late to the hearing on June 2, 1999 (TR, page 530) and departed early the same day due to other commitments (TR, page 714). He stipulated the hearing could proceed without his presence (TR, page 668).

⁷In her original notice of violation, the Administrator had included a charge that Zappalla Farms used Mr. Perez as an unregistered farm labor contractor to house migrant farm workers. In my Preliminary Decision and Order on Partial Findings, I dismissed that one portion of the violation. Before the ARB, the Administrator eventually withdrew her objection to that determination (ARB Final Decision and Order, August 29, 2001, page 3). I note that the ARB later in its decision misstated my finding on this violation by indicating that I upheld the civil monetary penalty related to this violation for housing, transportation, and driving (*Id.*, page 6).

21, 2001, I received notice from Mr. Steven Ward Williams that he no longer represented Mr. Nemias Perez (ALJ G). On the day of the hearing, Mr. Nemias Perez Roblero did not make an appearance. By both regular and certified mail, two hearing notices were sent to Mr. Perez's last known mailing address. Both notices were returned as undeliverable (ALJ D and ALJ E).⁸ Mr. Wallen and Mr. Campbell were present at the hearing. Neither counsel were aware of Mr. Perez's location.

My decision in this case is based on all the evidence admitted into the three hearings, as follows: AD 1 to AD 3 (pages 3, 17, and 18), AD 4 to AD 6, AD 6A, AD 7 to AD 15, AD 17, AD 18, AD 19 (pages A-3 to A-10), AD 20, AD 21 (pages A-18 to A-29), AD 22 (pages 2 to 7, redacted in part), AD 23 to AD 25, AD 27 to AD 33, AD 35, AD 36, AD 38, AD 39, AD 43 to AD 45, AD 46 (redacted), AD 47; DX 1; ZX 1 to ZX 3; PX 1 and PX 2.

ISSUES

To adjudicate the alleged violations of the Act by Mr. Perez and Zappalla Farms, as set out in AD 43 and AD 44, I must determine:

- 1) Whether Mr. Nemias Perez was a farm labor contractor within the meaning of the MSPA;
- 2) Whether Mr. Nemias Perez housed migrant farm workers without proper permits and authorization;
- 3) Whether Mr. Nemias Perez transported migrant farm workers without proper registration and license;
- 4) Whether Mr. Nemias Perez used the services of Mr. Amilcar Roblero and Mr. Freddy Roblero without ensuring their proper registration and authorization;
- 5) Whether Mr. Nemias Perez failed to provide safe vehicles for migrant farm worker transportation;
- 6) Whether Zappalla Farms is responsible for the transportation of migrant farm workers in the unsafe vehicles used by Mr. Nemias Perez;
- 7) Whether Zappalla Farms "utilized" Mr. Nemias Perez without confirming his certificate of registration for transporting and driving migrant farm workers;¹⁰ and,

⁸A continuance order mailed to the same address was also returned as undeliverable (ALJ C).

⁹At the March 2002 hearing, I admitted just one additional document, ZX 3.

¹⁰Since I have already dismissed the portion of the alleged violation relating to housing, the only remaining two aspects of this alleged violation involve the use of an unregistered farm labor contractor (Mr. Perez) (continued...)

8) Whether Zappalla Farms violated MSPA housing regulations at the Pollard Road trailer.

Parties' Positions

Administrator¹¹

Since counsel for Mr. Perez participated in the portion of the proceedings in which the Administrator presented her case-in-chief; and, after withdrawal of his attorney, he failed to appear in the most recent proceedings in March 20002, the Administrator expects a default judgment against Mr. Perez.

Due to both the geographic diversity of its farming operations and the provisions of its contract, Zappalla Farms did cause the transportation of migrant farm workers. Zappalla Farms' has 400 to 600 acres of fields scattered over two counties and runs two separate labor camps. The realty of their complex farming demands that the workers have transportation to get to the fields. Although car pooling by the migrant workers was the initial plan, Zappalla Farms ensured that the contract also contained an alternative plan in which Mr. Perez became responsible for getting the workers to the fields. His compensation was linked to the number of workers that were present to work. Additionally, Zappalla Farms was well aware of the hazards associated with overloaded vans. For these reasons, Zappalla Farms is responsible for the transportation of migrant farm workers in unsafe vehicles.

In regards to the other violations, Zappalla Farms did use Mr. Perez for unregistered activities and furnished housing that failed to meet regulatory standards. As a consequence, Zappalla Farms is liable for both types of violations.

Considering that the principle violation in this case caused multiple deaths and serious injuries, the assessed penalties are appropriate. Since the regulations require that each worker be provided with a secure seat during transportation, a per worker penalty assessment is warranted for each worker injured due to the absence of a secure seat. Additionally, limiting the penalty to a maximum of \$1,000 changes the penalty into a simple business expense, causing it to lose any deterrent effect.

Respondent Zappalla Farms¹²

Zappalla Farms did not cause migrant farm workers to be transported in unsafe vehicles. Under the regulations, 29 C.F.R. § 500.70 (c), the company does not bear responsibility for the

¹⁰(...continued) to transport and drive migrant workers.

¹¹Closing brief, received May 30, 2002.

¹²Closing brief, dated May 31, 2002.

failure of the farm labor contractor to provide safe vehicles because Zappalla Farms, as an agricultural employer, did not specifically direct or request that Mr. Perez provide the workers' transportation. Similarly, Zappalla Farms did not "cause" such transportation to be provided just because its fields are located in a rural location. The cited legal authority supporting the concept of causing transportation are factually distinct from the situation in Zappalla Farms' case. Further, under the terms of the contract with DeMay Labor and Mr. Perez, the workers were clearly responsible for their own transportation and Mr. Perez was solely responsible for ensuring the migrant worker crew arrived at the Zappalla Farms' fields. Although Zappalla Farms was a joint employer concerning several aspects of the workers' employment, the contract clearly shows that for purposes of transportation, Zappalla Farms was not a joint employer with Mr. Perez. Finally, since Zappalla Farms purposefully had no participation in the workers' car pooling arrangement, the company is not responsible under the Act for the use of unsafe vehicles by the workers.

Concerning the alleged housing violation, Zappalla Farms did lease a trailer to Mr. Perez and his immediate family. However, that trailer was not provided as an additional camp for migrant workers subject to the Act. When Zappalla Farms became aware of its unauthorized use, the company took economic sanctions against Mr. Perez. Additionally, because the alleged violation that Zappalla Farms used Mr. Perez to house workers has been dismissed, a critical element to support the directly-related housing violation is now absent.

Zappalla Farms did not use Mr. Perez as an unregistered farm labor contractor. There is no evidence that Mr. Perez actually drove any workers. Additionally, although Mr. Perez may have participated in the transportation of the workers, his role in that regard was unauthorized and unknown to Zappalla Farms.

Even if liability is established under the regulations, the Administrator has improperly computed the civil money penalties. Under the plain meaning of the statute and regulations, and since this is not a civil action brought by the individual workers, a penalty assessment based on each worker for each van is inappropriate. Instead, the maximum penalty for the alleged transportation violations is \$2,000. Notably, Zappalla Farms has been a good employer of migrant workers, who now provides their transportation. The imposed fines are not necessary as a means to prevent future or consistent violations.

SUMMARY OF EVIDENCE¹³

For the Administrator

¹³At the March 2002 hearing, I provided the parties an opportunity to highlight any inaccuracy in my summarization of the evidence in my Preliminary Decision and Order of Partial Findings (March 26, 2002 hearing, page 11). Since I did not receive any such corrections, I now incorporate, and repeat here, my previous summary of the testimonial and documentary evidence previously presented and admitted.

Sworn Testimony of Mr. Aldolfo Perez (TR, pages 26 to 57)¹⁴

While in Indiantown, Florida, Mr. Perez paid "Freddy" \$150 to transport him to New York. Freddy eventually worked as part of Mr. Perez's crew at Zappalla Farms. After arriving in New York in May, Mr. Perez planted onions at Zappalla Farms. Prior to going to work, he went to a house where a man speaking English helped with the employment paperwork. That man filled out the paperwork.

Initially, Mr. Perez stayed in a house with Nemias, who is not a relative. But, when he worked at Zappalla Farms, he resided in a Zappalla camp house, named Campo de los Coyotes. He rode to work at the Zappalla Farms in a light blue van driven by either Mr. Nemias Perez or his brother, Amilcar. After working the whole day in a field, he returned home in the van. The trip took about 25 minutes. Another brother, Leobardo, had a white van, which did have seats. Leobardo also worked for Zappalla. Mr. Perez rode around in the white van a couple of times, but it broke down. Mr. Nemias Perez also had a pinkish colored van that wasn't working. Mr. Aldolfo Perez didn't have a driver's license. All the workers agreed to go to work in Mr. Nemias Perez's van. The blue van did not have any seats in the back. The passengers sat on upside-down buckets. He traveled to work in the van every day.

Mr. Nemias Perez was his supervisor and Mr. Perez received instructions from Mr. Zappalla. Mr. Zappalla, the father, was always there so he probably saw Mr. Aldolfo Perez entering and exiting the van. Mr. Perez didn't complain to either Mr. Jim Zappalla or Mr. Sam Zappalla about his transportation. Likewise, he never complained about his housing.

When the blue van crashed into a tree, there were 17 workers in the van. He sustained injuries to his head, legs and waist. Mr. Amilcar Perez was driving. He paid either Nemias or Amilcar about \$7 a week to ride in the van. On the day of the accident, Mr. Perez had been harvesting onions.

Sworn Testimony of Mr. Salvador Gonzalez (TR, pages 58 to 84)

Mr. Gonzalez was in Indiantown, Florida when Freddy, Nemias' cousin, told him that Nemias had a labor contract for a New York farm. Freddy drove him and a group of workers to New York where they planted and harvested onions for Zappalla Farms. He paid Freddy about \$120 for the trip. Initially, he stayed a couple of nights at Nemias' house trailer in Williamstown. Then, when working on the Zappalla Farm, he stayed in a house owned by Zappalla Farms on Route 6.

¹⁴Mr. Perez testified through a sworn translator. His attorney in the civil litigation against all three Respondents in Federal district court, Mr. Peter Dellinger, was present during his testimony (TR, page 55).

He did not have a driver's license; so, Mr. Gonzalez rode to work in a blue van, with windows in the back, that was owned by Nemias and driven by Nemias' brother, Amilcar. The van only had a driver's seat; the rest of the passengers sat on buckets. Between 15 to 18 workers used the van everyday to get to work and the trips took about 30 minutes. After Mr. Gonzalez got in the van, they would stop at another camp, Campos de los Coyotes. He paid Nemias about \$15 a week for the transportation.

Nemias worked in the fields with him and sometimes rode in the blue van. The owner of the fields, Mr. Zappalla, would tell Nemias the field in which to work. They either worked in one field all day, or rode to another field if they finished early. Mr. Zappalla, the owner, saw them get in and out of the van; he would be waiting for them to arrive. Mr. Zappalla would follow them in the field supervising their work. Mr. Jim Zappalla also observed them get in and out of the van. On the day of the accident, after it had rained, Mr. Sam Zappalla instructed Nemias to have the workers leave. Mr. Gonzalez worked at Zappalla Farms April to July.

In the July accident, Mr. Gonzalez suffered multiple bone fractures in his ankles and knees. He also struggles with some memory problems. Because Nemias made the transportation arrangements, Mr. Gonzalez never complained directly to anyone at Zappalla Farms.

The only time he met Mr. DeMay was when he applied for employment. Nemias took them in Freddy's van to Mr. DeMay's house and they completed applications provided by Mr. DeMay. Since the documents were in English, Mr. Gonzalez couldn't read them. But, he knew he had to fill them out. He also watched a movie on safety. Mr. Gonzalez didn't know whether Nemias worked for Mr. DeMay.

Mr. Gonzalez has filed suit against Zappalla Farms because he can no longer work like he use to. He is receiving workers' compensation.

Sworn Testimony of Mr. Flavio Diaz a/k/a Mr. Pablo Morales¹⁵ (TR, pages 86 to 99)

About 17 workers came from Florida to Oswego. Upon arriving in New York, he filled out a work application in Nemias' trailer. At that time, he did not speak English. His work at Zappalla Farms included weeding, treating the fields, and planting onions. Nemias worked in the fields with him because he was "the contractor" and would tell the workers when to go home. Mr. Diaz got to work in a blue van and traveled between fields in a van. The blue van had windows in the back. The trips to work took about 10 to 15 minutes. There were two other vans: Leobardo's white van and Nemias' red van. None of the vans had seats so the passengers sat on buckets. The white van had windows in the back also. Either Nemias or his brother, Amilcar, drove the vans. Mr. Diaz paid \$7 to \$8 a week to Nemias' brother, Leobardo, for transportation. Mr. Diaz had neither a vehicle nor driver's license.

Nemias would get his orders from Mr. Zappalla and then he would pass them on to the

¹⁵The parties stipulated that Mr. Flavio Diaz is also known as Mr. Pablo Morales (TR, page 499).

workers. Mr. Zappalla was always present when they arrived and departed. In the blue van accident, Mr. Diaz suffered a broken leg and abdominal and chest injuries. At the time of the accident, Nemias owned the blue van and the red van. Mr. Diaz never complained to any Zappalla family member about his transportation.

Sworn Testimony of Deputy Thomas Ravesi (TR, pages 105 to 157)

Mr. Ravesi is an Oswego County Deputy Sheriff. On June 23, 1995, Deputy Ravesi investigated a traffic accident involving a white van owned by Mr. Amilcar Roblero, who lived in Williamson, New York (*see* AD 2 and AD 3). Deputy Ravesi was not able to determine who was driving the van at the time of the accident. After the collision, the van came to rest on its side with all its contents thrown to one side. The address for Mr. Roblero was obtained from a DMV computer.

Sworn Testimony of Mr. Frederick Ling (TR, pages 157 to 165)

Mr. Ling is a criminal investigator for Oswego County. He took the photographs presented in AD 5 within one hour of the July 5, 1995 accident. Prior to his arrival, firemen had rescued people from the van. The van was carpeted with two seats in front.

Sworn Testimony of Sheriff Reuel A. Todd (TR, pages 165 to 191)

Mr. Reuel Todd is the Under-Sheriff for Oswego County. In that capacity, he supervised the accident scene on July 5, 1995 (See AD 4). The accident van had been operated by Mr. Amilcar Roblero. The accident report was prepared by Deputy Ellie Davis. The accident occurred about 40 miles from the town of Williamson.

Sworn Testimony of Mr. Ufrano Lopez a/k/a Mr. Abodio Perez¹⁶ (TR, pages 192 to 238)¹⁷

While in Florida, Mr. Lopez heard about a job opportunity in New York through a friend. The friend brought him to New York. Freddy also drove some workers to New York. Freddy also worked in the fields a few days and then left. After the accident, Freddy came back to Zappalla Farms. Mr. Lopez first met Freddy at Zappalla Farms. Mr. Lopez never rode to work in Freddy's van, which was green or blue and light blue. The van was big and had glass in the back doors and seats with seat belts. Freddy didn't drive people to work because he wasn't "responsible for anyone."

¹⁶The parties stipulated that Mr. Ufrano Lopez is also known as Mr. Abodio Perez (TR, page 499).

¹⁷Mr. Lopez testified through a sworn translator.

Upon his arrival, Mr. Lopez stayed in Nemias' trailer. He is not related to Nemias. Later, when working in the fields, he lived in a barn-like house. The place was called Los Coyotes. Mr. Lopez worked on the Zappalla Farms weeding and planting onions starting the first of May.

Initially, he alternately traveled to work in three separate vans. Nemias owned all three vehicles. Eventually, two of the vans, a red and white van and a black Bronco, broke down. The third van was blue and involved in the accident. The white van and the blue van did not have any seats. It usually carried about 17 people. Nemias' brother, Amilcar, usually drove the blue van. He also would drive the red and white van sometimes. Nemias drove the black Bronco. Mr. Lopez did not have a vehicle or driver's license. He paid under \$12 to Nemias for the transportation.

Mr. Lopez rode in a van to work every day and he labored in many different fields. The trips took 25 to 30 minutes. Mr. Sam Zappalla saw the workers many times arriving and departing in the van. Mr. Zappalla's son also observed the workers coming and going in the van. Usually, 17 people rode in the van, sitting on buckets that were also used for weeding. Nemias provided the buckets. Mr. Zappalla gave Nemias instructions for the work crew.

About the time he started working at Zappalla Farms, Mr. Lopez had his paperwork filled out by a man named Cliff and a woman at Nemias' trailer. Many workers were there and some lived in the trailer.

On the day of the accident, Mr. Lopez only saw the blue van and Mr. Sam Zappalla's Blazer in the onion field. In the accident, Mr. Lopez suffered severe injuries, including a punctured stomach, and was in a coma for a week. He also suffered a loss of memory. (Mr. Lopez is also a plaintiff in a federal civil action against Zappalla Farms).

Sworn Testimony of Mr. Nemias Perez (TR, pages 240 to 374)¹⁸

Mr. Perez was born in Guatemala. He came to the United States in 1990 as a migrant farm worker. In that capacity, he worked in vegetable fields and as a poultry worker. On occasions, he did have crew leaders. In 1991 he came to New York to work and met Mr. Clifford DeMay once. He then left New York around September and did not return until 1994. Upon his return, he asked Mr. DeMay for work. Consequently, he lived and worked in the fields owned by Mr. DeMay. The house he lived in was only 200 to 300 feet from Mr. DeMay's house. He stayed in that work situation until starting to work for Zappalla Farms. Up to that time, he had never been a crew leader or a farm labor contractor. By 1995, he spoke a little English, yet at the 1997 hearing, he could not read English.

In 1994, Mr. Perez came to Mr. DeMay and told him that he wanted to be a crew leader. Mr.

¹⁸Mr. Perez testified through a translator.

Perez recognized his signatures on both AD 14 and AD 15. Mr. Perez wanted to be "in charge of the rest or like a supervisor, but that was it." At the same time, because he didn't understand the law, he really didn't know what the documents meant. In completing the form, someone from DeMay Labor asked him questions about his prior work and he provided the answers. He signed the document in Mr. DeMay's office without reading it. The house and phone number he put down belonged to Mr. DeMay. He had been using Mr. DeMay's address. The handwritten portions of the document were completed by Mr. DeMay's secretary. An incorrect country of birth, Mexico, is listed. The fingerprints accompanying the application belong to Mr. Perez. Mr. DeMay spoke to Mr. Perez in both English and Spanish. He tried to talk very slowly so Mr. Perez would understand what he was trying to say; but, Mr. Perez still didn't always understand him. At the same time, Mr. Perez didn't tell Mr. DeMay about communication problems because he didn't want to "bother" him. Mr. Perez also wanted to work and be in charge of a crew.

Eventually, in March, Mr. DeMay and Mr. Perez met with Mr. Jim Zappalla. Mr. Perez agreed with Mr. DeMay that he was going to work for Zappalla Farms. Mr. Perez didn't think he had a contract with Mr. Zappalla because Mr. DeMay had brought him to the meeting. Mr. DeMay told Mr. Perez that "everyone had to have their own transportation." But, Mr. Perez knew no one could drive. In most places, the farmers provided transportation. At the end of the meeting, Mr. Perez did understand: 1) Mr. Zappalla would be Mr. Perez's supervisor; 2) Mr. Perez would be the crew leader; 3) workers were responsible for their own transportation; 4) the work would start the first part of April, weather permitting; 5) the worker's hourly wage would be \$4.50; and, 6) Mr. DeMay would do the paperwork. The work disclosure form in Spanish (AD 25) said about the same thing.

Mr. DeMay also indicated he should try to find some workers. So, Mr. Perez contacted his friend from Guatemala, Mr. Freddy Roblero (or Perez), in Florida and asked him to find workers for Zappalla Farms. He also called other workers in Florida. Mr. Perez sent some forms down to Florida in Spanish. AD 25 is one of those forms. The form states the hourly wage will be \$4.50. In addition, each worker is responsible for his own transportation and costs. The employer is not responsible for transportation accidents.

Several of the individuals from Florida eventually were involved in the July 1995 van accident. When the workers arrived in New York, they stayed two or three days in DeMay's field camp, which was very nice, because the weather was bad and they couldn't start right away. No one was charged for that housing. During that time, the workers completed paperwork in Mr. DeMay's office and saw a safety video. Later, other laborers, who went directly to Zappalla Farms, also completed documents with DeMay Labor's assistance. The documents were in English and the workers just signed the papers. It's the same practice all over the country with migrant farm workers. After a couple of days, the workers moved to Zappalla Farms' camps. From that time on, they never stayed in his house. Mr. Perez never charged any of the workers rent. Mr. Perez was staying in a trailer on Route 3, provided by Zappalla Farms, and paid rent.

In January or March, Mr. Perez had a brown van, with six or seven seats, but it died prior to

the start of the work at Zappalla Farms. His brother Leobardo owned a small black Dodge and Mr. Perez also at one time drove a black Bronco. Because no one could drive, Freddy, who was just one of the workers, drove the other laborers to work the whole month of April and one week in May. Mr. Perez gave him directions to the appropriate fields. Mr. Perez recognized the photographs of Freddy's van (PX 1 and PX 2). The van had seats and seat belts and could hold 13 to 14 people. Freddy then had to return to Florida.

When Mr. Perez told Mr. DeMay and Mr. Zappalla about the crew's transportation problems, they told him to try to buy something at an auction. On another occasion, when Mr. Perez explained his difficulties in getting workers to the fields, neither Mr. Zappalla nor Mr. DeMay responded. Then, about the middle of May, Mr. Perez and his two brothers, Amilcar Roblero and Leobardo, bought a blue van, although not at an auction. Mr. Perez's share of the cost was about \$1,500 and he registered the van in his name. His brother, Leobardo, also had a white van in Delaware which he had owned since 1992. Sometimes, the workers rode in the white van. Mr. Perez gave the workers a ride in his van "because they needed it as much" as he did. Mr. Perez charged them for gas money. On the day of the accident, he was a passenger in the van. His brother, Amilcar, who was driving, only had "half a license" or learner's permit. He got out of the van at his home just before the accident. Freddy did return to Zappalla Farms sometime in May, but he no longer wanted other workers riding with him.

Mr. Perez worked in the fields with the other laborers. He was paid weekly on a 13% commission and earned about the same as the other workers. Based on instructions from Zappalla Farms, Mr. Perez told the other workers where to work. Sometimes, he received those instructions in Spanish from Mr. Zappalla. In fact, Mr. Sam Zappalla spoke in Spanish most of the time. At other times, Mr. Perez would do basic translation from English to Spanish to pass on the farming instructions. On occasions, the workers followed Mr. Sam Zappalla to different fields in a van. Sometimes they used two vans; but, one eventually broke down. Mr. Jim Zappalla speaks only a little Spanish, but Mr. Perez didn't deal with him much.

Mr. Perez recorded each worker's daily hours so they could get paid each week. Pages three to six of ZX 2 are the daily time sheets that he filled out during the week of July 2, 1995. It shows that Freddy's last name is Roblero. In addition, the time sheet shows Mr. Freddy Roblero worked on July 5th, so he drove his van to the fields that day. He left that day about the same time as the other workers but did not take any workers with him.

In the first week in May, about four people, including his brothers, Amilcar and Leobardo, and uncle, Felix, were staying in his trailer. He didn't charge any rent. However, Mr. Jim Zappalla did deduct some money from Mr. Perez's wages for the few days a couple of other workers stayed in the trailer.

Mr. Perez recognized his signature on AD 29.

Sworn Testimony of Mr. Remigio Zoc Mendoza (TR, pages 375 to 399)¹⁹

While in Florida, Mr. Mendoza received word from Mr. Nemias Perez about work in New York. Mr. Mendoza paid someone \$150 to bring him to New York. He initially stayed in Nemias' house at Zappalla Farms and rode to and from work each day in one of Nemias' vans. The blue and white vans didn't have any seats so they used buckets. The trips took 15 to 30 minutes. The white van was also involved in an accident. Mr. Jim Zappalla saw the workers getting into and out of the vans.

Mr. Mendoza did not have a vehicle or driver's license. None of the workers, other than Nemias, had a vehicle. He didn't receive any information about transportation. His hourly wage was \$4.75. "A lady and a guy" helped him fill out paperwork at Nemias' house. In the fields, Mr. Perez supervised their work. Mr. Mendoza never talked to anyone with Zappalla Farms. Mr. Freddy Roblero was part of the crew for a while but he went to Florida. However, he also worked on July 5th. Mr. Mendoza stated the van in the photographs, PX 1 and PX 2, belonged to Mr. Freddy Roblero.

In the blue van accident, Mr. Mendoza broke his back and suffered injuries to his head, arms and legs. Mr. Mendoza has lost his memory too.

Sworn Testimony of Mr. David Perez (TR, pages 400 to 433)

In Florida, Mr. Perez heard from Freddy that work was available in New York. For \$150, Freddy drove him to New York where he worked at the Zappalla Farms planting and cleaning onions. Mr. Perez lived in one of two Zappalla field camps. One camp was called Los Bombilla; the other camp was named Los Coyotes. Mr. Perez went to, and returned from, work in Nemias' van. The trip took about 35 minutes. Sometimes, Amilcar drove him home from the fields. If the workers had to move to another field during the day, they would travel in the van. The blue van didn't have any seats. It usually carried 17 people. Mr. Perez paid about \$8 or \$9 a week for the transportation. Nemias owned three vans, white, orange and blue; but, the first two vans usually broke down. Freddy has his own van but he didn't take any of the workers in it. Mr. Perez does not have a car or driver's license. PX 1 and PX 2 are pictures of Freddy Roblero's van.

Mr. Perez recognized his signatures on AD 46, pages 15 and 16. When he signed the documents, a man explained their purpose relating to taxes and working in the United States.

In the field, after getting instructions from Zappalla, Nemias would tell the workers what to do. Mr. Perez earned \$4.75 an hour. While in the fields, he occasionally saw Mr. Jim Zappalla and Mr. Sam Zappalla. They saw the workers get in and out of the vans. About three days after arriving from Florida, some man named DeMay, in his office, helped fill out the employment paperwork.

¹⁹Mr. Mendoza testified through a translator.

In the blue van accident, Mr. Perez hurt his head and was in a coma for over two months. As a result, he suffers memory loss.

During a break in the proceedings, Mr. Ford, a DOL investigator, stopped Mr. David Perez from going with Mr. Nemias Perez's attorney, Mr. Williams, to talk.

Sworn Testimony of Mr. Thomas J. Ford (TR, pages 511 to 797)

Mr. Ford is an investigator with the Wage and Hour Division of the U.S. Department of Labor ("DOL"). He has worked in DOL for 24 years and conducts 50 to 60 investigations a year, including 10 inquiries a year involving the MSPA. From July 6, 1995 through August 1995, he investigated the circumstances surrounding the fatal van accident that occurred on July 5, 1995 on Route 104, west of Oswego, New York. Accompanied by Mr. Joe O'Connor, a farm labor specialist, Mr. Ford went to the sheriff's office, received a partial accident report and examined the van. The next day, they interviewed some of the injured workers at the hospital. Next, he telephoned one of the Zappalla brothers, Mr. David Zappalla. Although not part of the Zappalla Farms partnership, Mr. David Zappalla does work for Zappalla Farms, taking care of equipment and running the daily operations of the farm.

At the time of phone call, Mr. Zappalla sounded "agitated and upset." He told Mr. Ford that his father, Mr. Sam Zappalla, had warned Mr. Nemias Perez and the workers that they were putting too many people in the van. It was overcrowded and unsafe. Previously, Zappalla Farms had always provided the transportation. However, they engaged DeMay Labor because it could guarantee a constant work force. In the past, they had lost work crews part way into the season. Mr. Ford recognizes AD 17 as his near-contemporaneous written commemoration of his conversation with Mr. David Zappalla. The document is not signed by Mr. David Zappalla and Mr. Ford did not ask Mr. Zappalla to verify the accuracy of its contents.

Eventually, Mr. Ford conducted an initial conference with Mr. Sam Zappalla, Mr. Jim Zappalla, and Mr. David Zappalla. Mr. Jim Zappalla indicated this was the first time they had used DeMay Labor and they had previously gotten their own workers and relied on their own transportation and vehicles. Mr. DeMay told them that vehicle registration checks had been run on the workers' vehicles, including the black Bronco. And, up until June 23, two vehicles had been in use, but after an accident with the white van, only one vehicle was used.

Around July 11, 1995, when Mr. Ford asked Mr. Jim Zappalla for a copy of Mr. Nemias Perez's farm labor contractor registration, he produced a New York registration (AD 28). Mr. Zappalla had not asked Mr. Perez for a copy of his Federal registration because he didn't know Mr. Perez needed one. Instead, he relied on Mr. DeMay to provide the records and Mr. DeMay had given him a photocopy of AD 28. At the same time, Mr. Ford acknowledged that Mr. Zappalla was not required to have a copy of Mr. Perez's registration card. Mr. Zappalla also produced a copy of the contract between Zappalla Farms and DeMay Labor (AD 23). Mr. Ford also received pay records between Zappalla Farms and DeMay Labor (AD 18 and AD 31), the pay records for Mr. Nemias

Perez and his crew (AD 19, AD 20, and AD 21) and housing permits (AD 33). Based on the total earnings and the number of hours, Mr. Ford believes the hourly rate for a worker was about \$4.50. The I-9s are immigration forms for various workers (AD 22). And, when he asked for a copy of the Zappalla Farms work disclosure form, he received a copy of AD 24. Eventually, Mr. Ford did obtain a copy of Mr. Perez's DOL farm labor contractor certification (AD 27), as well as the application for the certification (AD 14), from Mr. DeMay. And, he reviewed the original farm labor contractor certification provided by Mr. Perez (AD 27).

After his receipt of various documents, Mr. Ford inspected the workers' housing, including the Pollard Road trailer used by Mr. Nemias Perez. Zappalla Farms also had certificates for two camps, one southwest of Oswego and the other located on Gardinier Road. These locations were separated by many miles. Most of Zappalla Farms' fields are not connected; rather "[t]hey're scattered over at least three counties." There is no public transportation in this area.

Mr. Ford also received some documents from Mr. Clifford DeMay in his initial conference concerning transportation. According to Mr. DeMay, they started paperwork to register Mr. Perez as a farm labor contractor authorized to provide transportation (AD 32). But, upon viewing the poor condition of Mr. Perez's brown van, they stopped. All the annotations on the paperwork were present when Mr. Ford received the documents.

Mr. Ford also examined the three labor camps within a week after the accident. Two of the locations at Route 104 and Gardinier Road had received the requisite permits and certifications and were in good condition. The trailer at Pollard Road did not have any permits.

At the Pollard Road trailer, Mr. Ford observed a brown van, a red and white van, a black Bronco, and a blue Chevette. The brown van was on blocks and didn't have any wheels. The Chevette was full of clothes and boxes. And, the red and white van was in "disrepair" with flat tires. Only the Bronco appeared operational. Based on his conversations with Mr. Zappalla and Mr. DeMay, Mr. Ford believed Mr. Nemias Perez owned the black Bronco. They had been checking registrations to be sure Mr. Perez didn't use his own vehicle to transport workers. Once they saw he didn't own the vehicle, they didn't check any further. Mr. Ford did not on his own ascertain who owned the brown van. Likewise, he did not inquire about the ownership of the red and white van and doesn't know who owned the Chevette. Mr. Ford had observed Mr. Freddy Roblero's large van. He believes Mr. Roblero worked the day of the accident. He had also seen Mr. Roblero's van parked at the Gardinier Road camp.

Mr. Ford acknowledged that car pooling, "if done correctly," was a permitted activity under the Act. If workers get together and decide on their own, without involvement of a crew leader or farmer, then the car pooling is "done correctly."

As part of his investigation, on July 10, 1995, Mr. Ford interviewed Mr. Leobardo Perez when he came to the door of the trailer at Pollard Road (AD 35). Although Mr. Leobardo Perez spoke some English, Mr. Ford terminated the interview due to language problems. Mr. Ford only

recorded responses to questions that Mr. Perez indicated he understood. Based on what he understood from the witness, there appeared to be a housing violation. Mr. Ford made multiple trips to the trailer but never saw anyone other than Mr. Leobardo Perez. In light of the migrant workers' usual workday of ten hours, most of the workers would have been in the fields. He did find some of the injured workers at the camps and interviewed them.

At the Route 104 camp owned by Zappalla Farms, Mr. Ford interviewed both Mr. Jose Velasquez and Mr. Adon Ramirez (AD 36). Mr. Ford also drove from the Gardinier Road camp to various locations and recorded the mileage (AD 39).

At a final conference on July 13, 1995, Mr. Ford discussed his investigation findings with Mr. Jim Zappalla. They discussed the housing situation at the Pollard Road trailer. Mr. Zappalla indicated that he was aware other workers, besides members of Mr. Nemias Perez's immediate family, were living in the trailer. He had warned Nemias the workers couldn't live in the trailer and told them to get out. Mr. Zappalla also complained to Mr. DeMay who stated he would get the workers out of the trailer. But, nothing happened. So, Mr. Zappalla charged Mr. Perez \$5 per person per day to encourage Mr. Perez to get the other workers out of the trailer.

Based on a fair reading of the disclosure form, a migrant worker would not expect Zappalla Farms to provide transportation.

Mr. Freddy Roblero was not a farm labor contractor and Mr. Ford never discovered any contractual documentation between him and Mr. Nemias Perez.

Mr. Amilcar Roblero, Nemias' brother, owned a white van while working at Zappalla Farms and that van was involved in the June 1995 accident and destroyed. As crew members, there were no prohibitions against Mr. Amilcar Roblero and Mr. Freddy Roblero driving migrant farm workers.

The vehicle involved in the July 1995 accident was a 1985 or 1987 cargo van. Registration relates to license plates but does not necessarily show ownership. The van was put into operation after the white van crash.

No violation of the Act occurs if migrant workers themselves arrange transportation which happens to be unsafe.

Due to the July 1995 accident, Zappalla Farms was the "center of attention."

Mr. Ford believes he heard from Mr. Jim Zappalla that Mr. Nemias Perez had been fired.

Sworn Testimony of Mr. Joseph D. O'Connor (TR, pages 798 to 948)

Mr. O'Connor is a farm labor specialist with DOL. He works in part to facilitate application

of the MSPA. Prior to his current assignment, Mr. O'Connor had been a DOL investigator. While in DOL, he has participated in hundreds of investigations. He has taken several language courses including studies in Spanish. And, he uses foreign languages in his investigations.

On July 6, 1995, Mr. O'Connor joined Mr. Ford to start an investigation about the July 5, 1995 fatal van accident. They proceeded to the sheriff's office and then went to the office of Rural Opportunities to speak to several workers concerning the accident. Rural Opportunities is a migrant and seasonal farmers advocacy group. At the group's office, they gathered some basic information. Mr. Nemias Perez was present too. Next, they proceeded to a wrecking garage and the accident site to take pictures (AD 6). The wrecked blue van had no rear seats. DOL safety standards require a seat for all passengers.

The following day, Mr. O'Connor and Mr. Ford went to the Oswego Hospital and talked to some of the injured van passengers. Present during these interviews most of the time were Mr. Ford and Mr. David Sweeny, a clergyman, who they met at Rural Opportunities and is an advocate for migrant workers. Mr. O.'Connor spoke primarily Spanish with each worker, starting with Mr. Porfidio Gonzalez-Ramirez (a/k/a Porfidio Gonzalez), who was not seriously injured or under heavy medication. Because Mr. Sweeney is a native Spanish speaker, he assisted in the translations. Mr. O'Connor transcribed the conversation at that time and had Mr. Gonzalez sign the statement after Mr. O'Connor read it to him in Spanish (AD 7). Mr. O'Connor then went through the same process with Mr. Jose Velasquez and Mr. Meliton Velasquez (AD 8 and AD 9), except Mr. Sweeney was present for the entire interview and acted as the translator.

Mr. O'Connor conducted an interview in Spanish of Mr. Freddy Roblero on July 28, 1995 in the Rural Opportunities office (AD 10). The director of Rural Opportunities, Ms. Carmen Rebeur, and Mr. Ford were also present. As the interview proceeded, Mr. O'Connor wrote it down. He then repeated the statement to Mr. Roblero in Spanish. Then, Mr. Roblero signed it. Ms. Rebeur helped with the translation. Mr. Roblero was located through Rural Opportunities. Taking an interview in the headquarters of an organization is not a routine practice. In an early meeting on July 7, 1995 at Rural Opportunities, Mr. Daley, an attorney, was present. However, Mr. O'Connor did not seek his permission before interviewing Mr. Roblero. Mr. O'Connor has no doubts about the accuracy of the translation.

On July 24, 1995, Mr. O'Connor took a statement from Mr. Nemias Perez at the Rural Opportunities office (AD 11). A DOL investigator, Ms. Nancy Nolan, and the organization's director, Ms. Carmen Rebeur, were also present. The conversation was conducted in "mostly" Spanish. Mr. Perez described how he obtained workers from Florida through Mr. Roblero. Early on, Mr. Roblero provided transportation for the workers because Mr. Perez had problems with his Bronco and another van owned by Mr. Amilcar Roblero was involved in an accident. Mr. Freddy Roblero left his employment at Zappalla Farms about that time. Mr. Perez approached both Mr. DeMay and Mr. Zappalla about his transportation problem. Eventually, Mr. Perez bought a blue Chevy van that he used to transport the workers.

Mr. O'Connor reduced the interview into a handwritten statement, which Mr. Perez signed. Mr. O'Connor and Ms. Nolan witnessed the statement and Ms. Rebeur translated. Ms. Rebeur's function was to provide clarity during the discussion. A few days later, July 28, 1995, Mr. O'Connor also received from Ms. Rebeur a typed statement which she indicated came from Mr. Nemias Perez.²⁰

A computer printout from the New York State Police indicated that a vehicle with the license plate number 35755AE was registered to Mr. Nemias Perez (AD 12). That vehicle was the van involved in the July 5^{th} accident.

If an individual seeks authorization as a farm labor contractor to transport workers, he or she would be required to submit documentation establishing the safety of the vehicle, an inspection report, and certification that the insurance coverage meets the Act's requirements. Likewise, to house workers, a farm labor contractor must verify through inspection that the facilities meet the Act's standards. Mr. O'Connor verified through DOL that neither Mr. Amilcar Roblero nor Mr. Freddy Roblero were certified as farm labor contractors.

Mr. O'Connor reviewed AD 25, the work disclosure statement written in Spanish. The documents sets out the terms and conditions of employment at Zappalla Farms. The document points out that each worker must make his own arrangements for transportation and costs.

Mr. O'Connor's contact with representatives of Rural Opportunities was limited to the workers' interviews and some telephone conversations. He also had one contact with Farm Workers Legal Services when he and Mr. Ford decided Mr. Perez was too emotional to interview on July 7th. He is aware that Mr. Peter Dellinger is an attorney with Farm Workers Legal Services and represented the workers in the Federal civil lawsuit. DOL does take complaints from Farm Workers Legal Services.

During his investigation, Mr. O'Connor did not discover any written, contractual arrangement between Mr. Perez and Mr. Amilcar Roblero or Mr. Freddy Roblero. Also, his investigation disclosed that in addition to the blue van, the black Bronco, and the white van, other vehicles had been used in transporting workers, including a brown van, a red and white van, and a Chevy Citation. The sheriff's investigation of the June 23rd white van accident showed the vehicle belonged to Mr. Amilcar Roblero. Mr. Freddy Roblero had a two tone blue van. If that van had sufficient seats to accommodate all passengers, an inspection may have been approved.

Under the MSPA, the workers must be provided a disclosure form. The form contains information about the terms and conditions of employment, including transportation.

Mr. O'Connor assisted in the preparation of the fine assessment letter. While Mr. Perez was an authorized farm labor contractor, he was not approved for transportation or housing. He is aware that Zappalla Farms had workers' compensation insurance which paid the injured workers' medical

²⁰At the hearing counsel for the Administrator decided not to submit the typed statement (TR, page 864).

expenses. The camp on Route 104 was appropriate migrant housing. The paperwork for both Zappalla Farms camps at Gardinier Road and Route 104 was in order. Mr. Perez moved into the Zappalla trailer around early April. There's nothing improper in renting a residence to a crew leader and his family. A visiting migrant worker who stayed overnight would not violate the regulation. If a farmer is faced with someone not complying with the Act's housing provision, he or she may either apply for a proper permit or evict the occupant.

When DOL processes a farm labor contractor application, it checks, through fingerprints, for a criminal record. Also, the person must be authorized to work in the United States.

Sworn Testimony of Ms. Catherine Quinn (TR, pages 949 to 998)

Ms. Quinn has worked in DOL as an Assistant District Director for 12 years. In that capacity, she supervises investigators and prepares assessments, including the assessments against the Respondents (AD 43, AD 44, and AD 45).

In Mr. Perez's assessment, the maximum penalty for housing workers in areas without proper health and safety permits is \$1000. However, they imposed only \$200 because there were no serious injuries or problems. Concerning the unsafe vehicle citation, the fine was \$1000 per violation on a per worker basis. Neither van had proper seating for the workers and the blue van was operated beyond its weight limit. The maximum penalty was assessed in light of the fatalities and serious injuries and the number of workers involved. Since the driver, Mr. Amilcar Roblero, was Mr. Perez's brother, he's not considered a migrant worker. So, since there were 16 workers, besides Mr. Amilcar Roblero, transported at the time of the accident, the revised fine was 16 x \$1,000 (\$16,000).

She considered \$200 the appropriate fine for the offenses of failing to ensure a proper driver's license. Likewise, an assessment of \$600 was warranted due to his failure to register his brother and Mr. Freddy Roblero. Considering circumstances surrounding the accident, they imposed the maximum fine of \$1000 for Mr. Perez's failure to obtain proper transportation authorization. Finally, they imposed \$400 for housing workers without proper certification, based on the suggested amount on a Form 518.

In the Zappalla Farm's penalty, the rationale for the housing and unsafe vehicle violations remained the same, except the unsafe vehicle fine rose \$1,000 since there were 17 migrant workers in the accident van.²¹ Because Zappalla Farms permitted Mr. Perez to performed unauthorized farm labor activity, which included transporting the workers, the penalty calculation form recommended the maximum of \$1,000. In Ms. Quinn's view, since Zappalla Farms "caused transportation," by directing the farm labor contractor to transport workers, the company bears responsibility for the vehicle's safety. In a similar manner, DeMay Labor caused the transportation of workers because the company told Zappalla Farms that Mr. Perez would provide transportation and provided Mr. Perez

 $^{^{21}}$ In relation to Zappalla Farms, Mr. Amilcar Roblero was also a migrant worker in an overloaded vehicle.

to Zappalla Farms. Ms. Quinn acknowledged she didn't know how many workers traveled in the white van that's included in the fine's citation.

Under the regulations, a farm labor contractor can't participate in a car pool because a car pool is deemed to consist of only workers, without anyone in charge. Mr. Perez agreed to be a farm labor contractor and signed the paperwork.

For similar reasons, DeMay Labor was fined at total of \$17,000 for the unsafe transportation of the 17 migrant workers and \$1,000 for the use of Mr. Perez in unauthorized farm labor activity. DeMay Labor was considered a farm labor contractor because the company agreed to furnish workers to Zappalla Farms for an ongoing fee through the growing season.

The WH Form 518 lists violations and suggests certain penalty amounts. For an unsafe vehicle violation, the form recommends a fine of \$400 per violation. The policy is to assess \$1,000 per worker. The form doesn't state that policy but the regulations and a handbook permit a fine up to \$1,000. In another portion of the form, a note clarifies that although the fine for using "illegal aliens" is \$400 each, the maximum may exceed \$1,000. The Form WH 518 has been used since 1984, without revision.

Based on a conversation with a representative in Mr. DeMay's office, they sent the assessment letter to DeMay Labor rather than the Long View Fruit Farms.

Hospital Records (AD 1)²²

The medical records of Mr. Adolfo Perez, Mr. Salvador Gonzalez, and Mr. Flavio Diaz chronicle their treatments at University Hospital for their injuries, ranging from a broken leg to closed head trauma, related to the July 5, 1995 accident.

June 23, 1995 Accident Report and Photographs (AD 2 and AD 3, pages 3, 17, and 18)

On June 23, 1995 a van registered to Mr. Amilcar Roblero failed to yield at an intersection and struck another car. Photographs of the van's interior show only a driver's seat and a front passenger seat. The remaining portion of the van does not have any seats. The rear doors of the white van have windows.

July 5, 1995 Accident Report (AD 4)

²²At the hearing, I conditioned the admission of these medical records on production of the patient's signed releases. On June 10, 1999, I received only three releases from Mr. Adolfo Perez, Mr. Salvador Gonzalez, and Mr. Flavio Diaz. Accordingly, I admit their corresponding medical records as AD 1. At the same time, the medical records of Mr. David Perez and Mr. Remigio Xajac, absent their requisite consent, are not admitted and remain sealed. I also note the hospital did not find any record of treatment for Mr. Ufrano Lopez.

On July 5, 1995, Mr. Amilcar Roblero, while operating a van registered to Mr. Nemias Perez, lost control of the vehicle on State Road 104 and struck a tree. The cause of the accident is listed as unsafe weight load due to too many people in the van. The report lists the names of 17 occupants, including Mr. Adolfo Perez, Mr. Salvador Gonzalez, Flavio Diaz, and Mr. Ufrano Lopez.

July 5, 1995 Accident Scene Photographs (AD 5)

Numerous color photographs of an accident scene on July 5, 1995, showing a dark blue cargo van wrapped around a tree. Apparently, the van had only two front seats. The rear doors had windows.

Wrecked Van and Accident Scene Pictures (AD 6)

Photos taken July 6, 1995 by Mr. O'Connor at a wrecking company show a bent-in-half blue cargo van with several buckets in the back and no apparent rear seats. The accident scene shows scrap marks on the pavement and road shoulder leading up to a tall tree with bark damage.

Death Certificates (AD 6A)

The three death certificates document Mr. Alberto Gonzalez, 25 years old, Mr. Andres Escalante, 24 years old, and Mr. Dagoberto Roblero-Vasquez, 44 years old, as fatalities in the July 5, 1995 van accident.

Mr. Porfidio Gonzalez-Ramirez's July 7, 1995 Statement (AD 7)

In a signed statement, dated July 7, 1995, Mr. Gonzalez stated he came to New York from Florida after Freddy told him about work and an hourly wage of \$4.50. He paid \$150 to come to New York with several other workers. He went to work each day in the blue van, driven by Amilcar, that had the accident. He paid some money each week for gas. In the last week, they all traveled in the blue van. Mr. Sam Zappalla, Mr. David Zappalla, and Mr. Jim Zappalla saw them arrive and depart in the van. Mr. Sam Zappalla was in the fields each day and directed the work which involved weeding the onion crop. The witness/translator was Mr. O'Connor.

Mr. Jose Velasquez's July 7, 1995 Statement (AD 8)

In a signed statement, dated July 7, 1995, Mr. Velasquez indicated he came to New York from Florida with several other people. He paid \$150 for the trip and was attracted by the cooler climate, free housing, and the hourly wage. He met Nemias in the trailer. On the day of the accident, all the workers traveled in one van. They had been going to and from work in that blue van for about two weeks. Mr. Amilcar Roblero was usually the driver. Mr. Sam Zappalla, Mr. David Zappalla, and Mr. Jim Zappalla saw the workers arrive and depart in that van. He paid about \$9 a week for the transportation. On the day of the accident, they left the field with about 20 people in the van. Then, they dropped off Mr. Nemias Perez and two other workers at the trailer on Pollard Road. There had been three vans. They used the white van but it was involved in an accident two weeks

earlier. The white van did not have any rear seats. They used buckets as seats because the van floor was hot. Mr. Sweeney translated the conversation and Mr. O'Connor served as a witness.

Mr. Meliton Velasquez's July 7, 1995 Statement (AD 9)

In a signed statement, dated July 7, 1995, Mr. Velasquez indicated that after hearing from Freddy about the terms of employment in New York, Mr. Velasquez paid \$150 to travel to New York with 13 other workers. He met Nemias in Williamson. Two workers, plus Mr. Nemias Perez's uncle and two brothers, were staying in his trailer. Nemias was a good crew leader and took them wherever they needed to go. In the two weeks after an accident, all the workers rode in the blue van to and from work. Amilcar drove the van each day. Mr. Velasquez paid Nemias \$9 a week in gas money. There were no seats in the back of the van. The passengers sat on buckets, and Mr. Velasquez was sitting on the spare tire when the accident occurred. Freddy drove his own van and did not travel with them. Sam saw them coming and going each day. On the day of the accident, Sam came over to talk to the workers in the van and told them not to go to another field because of the rain. The Zappallas would tell Nemias where the crew should work. The statement was witnessed by Mr. O'Connor. Mr. Sweeney was the translator.

Mr. Freddy Roblero's July 28, 1995 Statement (AD 10)

In a signed statement, dated July 28, 1995, Mr. Roblero stated that after receiving a call from Nemias telling him about work in New York and asking him to bring workers, Mr. Roblero drove 12 workers from Indiantown, Florida. He stayed in the DeMay camp for three days and then started to work at Zappalla Farms. On April 4, 1995, he took all the workers in his van to Mr. DeMay's office to fill out paperwork and watch a film on pesticides. Nemias drove his Bronco to the office. Mr. DeMay saw the workers get in and out of his van. They started work at Zappalla Farms on Saturday, April 8, 1995. For the next four weeks, Mr. Roblero's van was the only vehicle in the group, other than Nemias' Bronco, to transport the workers. Jim and Sam saw him driving the workers; the Zappallas never spoke to him about his van. Mr. Zappalla told Nemias where to send the workers and then Nemias told Mr. Roblero. In early May, Mr. Roblero returned to Florida. When he returned to Oswego in early June, the workers were using a white van and a blue van for transportation. Although Nemias drove sometimes, Leobardo and Amilcar usually were the drivers. Mr. Roblero did not use his van then to transport workers. Mr. O'Connor witnessed the statement and assisted in the translation. Ms. Carmen Rebeur also translated.

Mr. Nemias Perez's July 29, 1995 Statement (AD 11)

In a signed statement, dated July 29, 1995, Mr. Perez said he was first introduced to Mr. Clifford DeMay in 1991 and knew he was a person to seek out for work. He met Mr. DeMay again in June 1994 when he came to work in New York as an apple picker and onion field worker. After

expressing his desire to be a crew leader to Mr. DeMay, Mr. DeMay advised that he obtain a crew leader card which he'd need to be a farm labor contractor.

Cliff took Mr. Perez to Mr. Zappalla and explained that Mr. Zappalla would tell him what to do. Mr. Perez was to recruit and furnish 20 workers for Zappalla Farms. He would tell the workers what to do and take care of them. Mr. Perez called his friend, Freddy, in Florida and described the work situation in New York, as presented by Mr. DeMay and Mr. Zappalla. The farm needed about 20 workers and Freddy drove the workers to New York. The passengers paid Freddy for the trip. Cliff and Zappalla stated Mr. Perez would receive 13% of the workers' wages as his fee. Jim told him that he was responsible for transporting the workers to and from work. Freddy provided the transportation in his two-tone blue van. Mr. Perez sometimes paid Freddy gas money.

Mr. Perez lived in a trailer with his two brothers, Leobardo and Amilcar. At the start of the onion planting season, there were eight other workers living in the trailer. Mr. Zappalla knew about the workers because he charged Mr. Perez \$5 per person. Mr. Zappalla took out \$140 for one month from Mr. Perez's pay, in addition to his usual rent of \$75 a week, when the workers lived there.

Cliff told Mr. Perez not to drive workers in his car. Cliff wanted all the workers to use their own cars. Mr. Perez's conversations were in English. He understood spoken English better than the written version. At the start of the planting season, there were 16 workers on his crew and three vehicles: his Bronco, Freddy's van, and his brother's car. Because he did not use his Bronco to transport anyone, the workers came to and from work in the other two vehicles. Mr. Perez would tell Freddy and his brother which fields the laborers had to work. About the time Freddy returned to Florida, Mr. Perez's brother's car transmission failed. As a result, his brother went to Delaware to get a white van that he also owned. In addition, Mr. Perez's Bronco broke down.

When he discussed his transportation problems with Mr. Jim Zappalla, Mr. Zappalla stated it was Mr. Perez's problem. Mr. Perez asked if Mr. Zappalla could send someone to pick up the workers. Mr. Zappalla replied he'd have to be paid for gas. Mr. Perez then asked how he could pay if they were Mr. Zappalla's field workers. Mr. Zappalla was interested in getting the workers to the fields; "not how they got there." In May, Mr. Perez told Mr. DeMay that his Bronco was broken, his brother's car wasn't working, and the white van was also broken. "Cliff didn't say anything." In May and part of June, the workers only had one van. Then, Mr. Perez purchased a blue Chevrolet van. However, around June 23, 1995, his brother wrecked his white van. So, from that time until July 5, 1995, the workers only had the blue van for transportation. Mr. Perez's brother usually drove the van. Mr. Perez did not pay his brother for driving. All three Zappallas knew they were only using one van. Around 6:00 p.m. on the day of the accident, Mr. Sam Zappalla drove to the field to tell them to stop work for the day. He parked behind the van. At that moment, all 19 workers were in the van. Mr. O'Connor and Ms. Nolan witnessed the statement. Ms. Carmen Rebeur provided the translation.

Registration Report (AD 12)

The report shows a blue Chevy van, with license plate number 35755AE, registered to Mr. Nemias Perez who lived on Pollard Road.

Application for Farm Labor Contractor Certificate (AD 13)

On March 10, 1994, Mr. Clifford DeMay submitted an application to become a farm labor contractor authorized to recruit and provide workers, transport and drive workers, and house workers. He attached the requisite vehicle insurance and inspection documents and the appropriate State housing permit.

Application for Farm Labor Contractor Certificate (AD 14 and AD 15)

The farm labor contractor application (AD 14), dated August 18, 1994, was submitted by DeMay Labor on behalf of Mr. Nemias Perez. In the application, Mr. Perez indicates the largest number in his crew will be 20. He intended only to recruit, solicit, hire, employ, furnish, and pay the workers. He would not be involved in transportation. Instead, the workers would use "their own vehicles." Mr. Perez asserted he would not drive the workers. Mr. Perez's signature was notarized by Ms. Janet DeMay. The fingerprint card does show Mexico for country of birth, but the citizenship is listed correctly as Guatemala and the application in two locations indicates Guatemala as place of birth.

The second farm labor contractor application (AD 15), dated March 10, 1995, contains essentially the same information and declaration except the residence address is listed as 5632 Morse Hill Rd, Williamson, NY rather than the earlier 5565 Morse Hill Rd, Williamson, NY. And, the crew number has increased to 30.

Employee Interview Statement (AD 17)

On July 7, 1995, Mr. Thomas Ford reported his conversation with Mr. David Zappalla. Mr. Zappalla indicated this was the first year they had used DeMay Labor. Previously, they had obtained their own workers, transportation, and insurance. But, they had lost crews during the season and DeMay promised a work force no matter what happened. The crew was responsible for their own transportation. Mr. Sam Zappalla had warned Mr. Nemias Perez and the other workers that the vehicle was overloaded and not safe. Zappalla Farms provided housing, payroll and supervision. He didn't know what arrangement existed with DeMay about workers' compensation insurance and didn't know if a fee was paid to Nemias.

Zappalla Farms Payment Invoice (AD 18)

This invoice indicates weekly payments from Zappalla Farms to DeMay Labor from April 9, 1995 to July 1, 1995 at a three percent rate for the subject Perez. The weekly payments ranged from \$57.71 to \$275.97.

Zappalla Farms Employee Check Histories (AD 19 pages A-3 to A-10) and AD 21 (pages A-18 to A-29))

This multi-page document lists the payment histories of numerous workers, including Mr. Nemias Perez, Mr. Ufrano Lopez, and Mr. David Lopez, during the spring of 1995. AD 21 shows payments to Mr. Freddy Roblero from April 15, 1995 to May 5, 1995 and June 10, 1995 to July 8, 1995. The entries for Mr. Freddy Roblero are marked-over by an "X".

Zappalla Farms Checks (AD 20)

The front side of several checks, payable to Mr. Nemias Perez, and issued between May 12, 1995 and June 23, 1995, are contained in this exhibit. His compensation rate was 13% of an unspecified number that yielded payments from \$104.97 to \$441.20.

Forms I-9 (AD 22, pages 2 to 7, redacted in part)

Employment Verification documents for several workers, completed by Mr. Clifford DeMay and Ms. Janette Nevlezer, between January 30, 1995 and May 9, 1995 and verified by Mr. DeMay and Ms. Nevlezer between April 4, 1994 and June 12, 1995.

Commemoration of a March 9, 1995 Meeting (AD 23)

A document, dated March 9, 1995, signed by Mr. DeMay and Mr. Jim Zappalla, sets out the terms of employment of Mr. Perez, starting in April. Mr. Perez was responsible for making sure the workers had the means to get to work. And, if that responsibility required Mr. Perez to supply the transportation, he was required to obtain the necessary licenses for him and the vehicle. In return, Mr. Perez would receive 13% of the gross wages for his crew.

DeMay Labor agreed to take care of disclosure statements, worker agreements, tax forms and documents, and Mr. Perez's licensing so that he could work for Zappalla Farms. DeMay Labor would also help Mr. Perez replace workers as necessary. Finally, DeMay Labor would keep Zappalla Farms aware of new law and any "potential problems that we are aware of." For these services, DeMay Labor received 3% of the gross wages for the crew, and 0% of Mr. Perez's wages.

Zappalla Farms Agricultural Work Agreement (AD 24)

This preprinted, and unsigned, form sets out the contractual provisions associated with work on the Zappalla Farm. The filled-in dates for the contract season are April 10, 1995 to October 16, 1995. The annotated hourly rate of base bay is \$4.50, which increases to \$6.00 in September. The document indicates transportation to the work site is available but subject to review.

Worker Disclosure Notice in Spanish (AD 25)²³

This form in Spanish indicates Zappalla Farms is the employer and the dates of employment cover April 10, 1995 through October 20, 1995 at the rate of \$4.50 per hour. The notice also indicates that each worker should have his own transportation and the employer is not responsible for accidents associated with transportation.

DOL Farm Labor Contractor Certification (AD 27)

On August 24, 1994, Ms. Wooten approved Mr. Nemias Perez's certificate of registration as a farm labor contractor. However, he was not authorized to drive, transport, or house migrant farm workers.

New York State Farm Labor Contractor Registration (AD 28)

This document records Mr. Nemias Perez's registration by the State of New York as a farm labor contractor on May 11, 1995. His address is listed as 5505 Morse Hill Road.

Workers' Compensation and Disability Waiver (AD 29)

On April 10, 1995, Mr. Perez signed a New York document indicating he didn't need workers' compensation coverage due to a Zappalla Farms' compensation insurance. He also claimed an agricultural exemption for disability coverage.

<u>Insurance Certificates for Zappalla Farms (AD 30)</u>

On April 17, 1995, Zappalla Farms obtained insurance coverage for its farming operations.

DeMay Labor Compensation Worksheet (AD 31)

This worksheet sets out compensation to DeMay Labor of 3% of gross labor costs for the week of April 4, 1995. The document also lists several workers' names, including individuals injured in the July 5, 1995 van accident.

Transportation Registration Documents (AD 32)

The first document is undated form letter (purportedly signed by "Janetee - assistant to Mr. DeMay," and addressed to Mr. Wooten at DOL) forwarding a vehicle mechanical inspection certificate and vehicle insurance information for Mr. Perez. An annotation on the upper, right-hand

²³This summary is based on my rudimentary understanding of Spanish as corroborated by the translations of Mr. Perez (TR, pages 360 to 362) and Mr. O'Connor (TR, pages 886 to 888).

corner reads, "never sent/brown van." The second document is also a form cover letter which is unsigned, addressed to Mr. Wooten, and dated April 6, 1995. The letter forwards an application for transportation authorization for Mr. Perez. An annotation states, "never sent."

Housing Certificates (AD 33)

On April 10, 1995, both Mr. Nemias Perez and Mr. James Zappalla signed housing certificates for camps on Route 104 and Gardener Road indicating compliance with Federal housing standards. Another document indicates that both Mr. Zappalla and Mr. Perez were the persons in charge of the housing.

Mr. Ford's Interview Notes - Mr. Leobardo Perez (AD 35)

According to Mr. Ford, on July 19, 1995, Mr. Leobardo Perez indicated that he lived in the trailer with his brothers Nemias and Amilcar, and his uncle and another worker. Everyone worked at Zappalla Farm. The Zappallas owned the trailer and Nemias paid them rent. Mr. Ford recorded "very difficult language barrier."

Mr. Ford's Interview Notes - Mr. Velasquez and Mr. Ramirez (AD 36)

On July 13, 1995, Mr. Ford documented his conversations with Mr. Jose Velasquez and Mr. Adon Ramirez. Mr. Freddy Roblero drove 11 workers from Indiantown, Florida, to New York for \$150 pers person. Nemias hired them when they arrived and they made \$4.50 per hour. The housing camp has sufficient food, hot water, and sleeping arrangements. Mr. Ford stated the interview was limited due to the "language barrier."

Oswego Town Court Disposition (AD 38)

On September 29, 1995, Mr. Amilcar Roblero was convicted of the charges of unlicenced operator, overweight vehicle, and speed. He was fined a total of \$190.00, with two surcharges of \$25.00 for "fine not paid."

Mileage Log (AD 39)

A handwritten list of locations with corresponding mileages indicated between the Gardinier Road camp and locations.

Assessment Letter (AD 43)

On August 16, 1995, the District Director assessed a total fine of \$21,400.00 against Mr. Nemias Perez as follows:

# 12	\$200	Housing workers at Pollard Road without a health and safety permit.
# 26	\$400	Housing workers at Pollard Road without proper authorization.
# 14	\$200	Transporting workers without proper driver's license.
# 25	\$1000	Transporting workers without proper authorization.
# 20	\$600	Engaging the services of Mr. Amilcar Roblero and Mr. Freddy Roblero
		without proper registration and authorization.
д 12	¢10 000	Failing to marride and transport validates through the way of a blue

13 \$19,000 Failing to provide safe transport vehicles through the use of a blue Chevy van and a white Chevy van without proper seating for workers.²⁴

Assessment Letter (AD 44)

On August 16, 1995, the District Director assessed a total fine of \$20,200.00 against Mr. James R. Zappalla, Mr. John Zappalla, and Mr. Samuel Zappalla, as partners in Zappalla Farms, as follows:

π 12 π 200 Housing workers at Fonara Road without a health and safety per	ousing workers at Pollard Road without a health and sa	fety permit
---	--	-------------

13 \$19,000 Failing to provide safe transport vehicles through the use of a blue Chevy van and a white Chevy van without proper seating for workers.²⁵

16 \$1000 Using Mr. Perez for unauthorized farm labor contractor activities.

Assessment Letter (AD 45)

On August 16, 1995, the District Director assessed a total fine of \$20,200.00 against Mr. Clifford DeMay, doing business as DeMay Labor, as follows:

# 12	\$200	Housing workers at Pollard Road without a health and safety permit. ²⁶
	Ψ200	Troubing workers at I onare Road without a neath and safety permit.

13 \$19,000 Failing to provide safe transport vehicles through the use of a blue Chevy van and a white Chevy van without proper seating for workers.²⁷

16 \$1000 Using Mr. Perez for unauthorized farm labor contractor activities.

²⁴On September 2,1997, the \$19,000 fine assessment for failing to provide safe transportation was reduced by \$3,000 to \$16,000. Consequently, the total assessment against Mr. Perez became \$18,400.

²⁵On September 2,1997, the \$19,000 fine assessment for failing to provide safe transportation was reduced by \$2,000 to \$17,000. Consequently, the total assessment against Zappalla Farms became \$18,200.

²⁶This charge was subsequently dropped by DOL (TR, page 964).

²⁷On September 2,1997, the \$19,000 fine assessment for failing to provide safe transportation was reduced by \$2,000 to \$17,000. Consequently, the revised total assessment against DeMay became \$18,200.

W- 4 Employee Withholding Form, W-4, and Employment Verification Form I-9 (AD 46, redacted)²⁸

This exhibit contains the withholding tax certificates and employment verification forms for sixteen workers, including Mr. Flavio Diaz, Mr. Remigo Tzoc, Mr. Amilcar Roblero, Mr. David Perez, Mr. Salvador Gonzalez, and Mr. Ufrano Lopez. On the I-9s, either Mr. Clifford DeMay or Ms. Janet Nevlezer signed as the preparer and/or translator and as the designated agent for the employer, Zappalla Farms. Most of the workers listed Indiantown, Florida as their residence. The documents are dated from January 30, 1995 to May 9, 1995.

Letter (AD 47)

In a letter, dated January 2, 1995, Mr. James Zappalla, president of Zappalla Farms, informs Mr. DeMay that he will need a crew of 15 for the spring growing season. The rate of pay will be \$4.50 an hour. A 7% crew leader charge to be paid by Zappalla Farms will cover transportation and crew supervision. DeMay Labor will receive a 3% to cover all paperwork.

For Respondent Zappalla Farms

Sworn Testimony of Mr. David M. Zappalla (March 26, 2002 hearing, pages 14 to 46)

[Direct Examination] Never a partner in Zappalla Farms, Mr. David Zappalla was working as an employee of the partnership in 1995. On July 5, 1995, Mr. Zappalla received a phone call from Mr. Thomas Ford. He remembers the conversation because the accident that occurred on that day was a significant and sad event. Mr. Ford started asking Mr. Zappalla about the migrant crew that had been involved in the accident. Mr. Ford did not ask him whether he was a partner in Zappalla Farms.

Mr. Zappalla told Mr. Ford that Zappalla Farms had difficulty in the past getting crews to the fields. So, in 1995, the company tried a different program with DeMay Labor. Mr. Ford then asked Mr. Zappalla about his father, Mr. Sam Zappalla. Mr. Zappalla told Mr. Ford that after the accident his father stated that he had just told the crews and drivers to make sure they didn't put too many people in the van. Both Mr. Zappalla and his father were shocked and saddened by the horrible accident. Having reviewed AD -17, Mr. Zappalla indicated that Mr. Ford's notes are not an accurate representation of their conversation. Mr. Zappalla was not able to give Mr. Ford any payroll information.

At the beginning of 1995, Mr. Zappalla worked with the operators to keep the equipment operational and helped the planting crews. He didn't work closely with the labor crews. But, around April or May of 1995 he did see them sometimes. About that time, he remembers the labor crew

²⁸See TR, pages 594 to 596.

being transported in a long, fifteen passenger, two tone blue van. Through the windows, he was able to see the interior and seat belts.

[Cross Examination] Mr. Zappalla did not take notes at the time of his conversation with Mr. Ford. Although he would not have stated the following information to Mr. Ford, Mr. Zappalla acknowledged that Zappalla Farms possibly offered housing to migrant workers and performed payroll functions. Zappalla Farms did supervise the farm crews.

Part of the equipment Mr. Zappalla handles involves irrigation of the farm's onion fields. These fields are bounded on several sides by irrigation ditches. The ditches are two to fourteen feet wide and three to ten feet deep. Due to the mucky condition of the fields during the planting season, and the presence of crops during the weeding season, vehicles are usually not driven on the fields. The fields are flat and contain some obstacles. Sometimes visibility is obscured by trees when the field curves. These fields are located in Oswego and Cayuga counties. Members of Zappalla Farms communicate by radio. Mr. Jim Zappalla and Mr. Sam Zappalla had such radios; the crew leaders did not.

Mr. Zappalla has worked for Zappalla Farms since 1983. From 1983 to 1994, Zappalla Farms provided transportation for the workers. The company used an 18 passenger bus. Zappalla Farms also used to two, nine passenger, Suburban vehicles. Mr. Zappalla uses a pickup truck.

Mr. Zappalla believes a person named "Freddie" owned the long van. Mr. Zappalla had no dealings with Freddie Roblero. The last time he recalls seeing the two tone blue van was sometime in September.

The vans bringing people to the fields parked by the fields on the roadway or its edges. Mr. Zappalla also saw the vans at the location where Mr. Perez was living.

[ALJ examination] The vehicles used by Zappalla Farms before 1994 had a seat for every worker. After the July 1995 accident, Mr. Zappalla became aware that the accident vehicle, a paneled van, did not have a seat for every worker.

[Re-direct examination] Mr. Zappalla knows Mr. Perez. He doesn't recall seeing Mr. Perez drive any of the vans transporting the workers. Mr. Perez usually drove a Ford Bronco. Because there were so many vans, Mr. Zappalla doesn't recall how long before the accident he actually observed the accident vehicle. He remembers a white van, a gold bronze van, a two tone blue van, and the blue van involved in the accident. The two tone van belonged to Freddie Roblero. Mr. Zappalla may have also seen a red and white van.

[Additional cross examination] Mr. Zappalla doesn't know who owned the various vans. Because most of the other vans didn't have windows, Mr. Zappalla is not aware of whether the other vans had seats for everyone.

Sworn Testimony of Mr. James R. Zappalla (March 26, 2002 hearing, pages 47 to 91)

Presently, Mr. James Zappalla, one of the named respondents, is the sole owner of Zappalla Farms. In 1995, Zappalla Farms was operating as a partnership, consisting of Mr. Sam Zappalla, Mr. John Zappalla, and Mr. James Zappalla. Mr. Sam Zappalla and Mr. John Zappalla have retired and no longer have any ownership interest in Zappalla Farms.

Mr. Zappalla became a partner in 1978. In the 1994 growing season, Zappalla Farms had problems with migrant workers leaving the farm early and they were informed their crew leader would not return for the 1995 season. In searching for a replacement, they met with Mr. Clifford DeMay in the early spring of 1995. Mr. DeMay recommended Mr. Nemias Perez as a crew leader. At a second meeting with Mr. DeMay, Mr. Perez was present. Zappalla Farms and DeMay Labor signed a written agreement (AD 23), prepared by DeMay Labor, indicating DeMay Labor would provide labor for the 1995 growing season. Under the DeMay program, the workers would be car pooling to the fields. That was a complete change for Zappalla Farms because they previously had provided transportation for the workers. They questioned Mr. DeMay about whether car pooling would be effective. He assured them that it had been working well. However, due to Zappalla Farms' concern about the reliability of car pooling, an alternative provision was included in the agreement that if Mr. Perez had to provide transportation, he would obtain the proper licenses.

Mr. Zappalla can read some Spanish. He recognizes ZX-3 as the worker agreement, written in Spanish. Mr. Zappalla's signature appears at the bottom of the page. They provided the agreement to DeMay Labor to give to the workers. Consequently, prior to arriving at Zappalla Farms, the workers would understand the terms of their employment. The document informed the workers that they were responsible for their own transportation and Zappalla Farms would not be responsible for accidents or injuries during the course of their transportation.

Due to the DeMay plan, Zappalla Farms did not prepare any of its own vehicles for transporting the workers in 1995. When the workers first came to Zappalla Farms, they arrived in a two tone blue van driven by Freddie Roblero. With the exception of about four weeks, Mr. Roblero's van was in operation at the farm, including July 5, 1995. During the season, Mr. Zappalla saw the workers use a "multitude" of vans. The workers used a white van, an orangish white van, a tan gold van, the blue van involved in the accident, and the two tone, blue van. Mr. Perez also had several of his own vehicles. Mr. Zappalla never saw Mr. Perez as a passenger in any of the vehicles used for migrant transportation.

In late June 1995, Mr. Perez told Mr. Zappalla that he had a problem with the car pooling arrangement due to broken down vehicles. Mr. Zappalla responded that the workers needed to ensure they could get themselves to work. It was their responsibility. Mr. Zappalla then passed on Mr. Perez's concerns to Mr. DeMay. Mr. DeMay said he would speak with Mr. Perez and move things forward. Later in the week, the workers had another broken down vehicle, so Zappalla Farms used one of the Suburbans to get them to work that one day. Mr. Perez indicated that he was working out the problem with Mr. DeMay. Mr. Zappalla is not actually sure how but they apparently

got the vehicles repaired and the workers had transportation. About that time, perhaps two days before the accident, the blue van showed up. Mr. Zappalla never saw inside the paneled blue van. He never saw Mr. Perez drive, or ride as a passenger in, that van. Likewise, no one ever reported Mr. Perez was driving, or riding in, it. Had Mr. Zappalla received such reports, he would have been very concerned because in their first meeting, Zappalla Farms and Mr. DeMay made clear to Mr. Perez that he could not be involved in the transportation of the workers. Mr. Perez told Zappalla Farms that he was driving a Bronco and an Escort. Mr. Zappalla did not know Mr. Perez had an ownership interest in the blue van.

[Cross examination] The workers were paid by a mix of hourly wage and piece rate. Mr. Perez was paid by commission, as a percentage of the workers' wages. As crew leader, if the workers didn't show up, Mr. Perez would not get paid.

Zappalla Farms is farming several fields totaling between 400 to 600 acres. The property is located in different areas in two counties. The central office is in Cato, New York. At the same location, on Pollard Road, the company has a trailer that it rents to the crew leader. Zappalla Farms also has two farm worker camps, located on Route 104 and on Gardinier Road. These facilities are separated by miles.

By phone, Mr. Zappalla would discuss the day's schedule with Mr. Perez at the beginning of the day. Zappalla Farms gave Mr. Perez maps showing the locations of the fields. Directions for moving the workers from field to field during the day would come from either Mr. Perez or Mr. Sam Zappalla, Mr. Zappalla's father, if he happened to be in the field. Mr. Zappalla himself also occasionally directed the workers to other fields.

Based on the various locations of the vans, including Mr. Perez's trailer, Mr. Zappalla presumes that Mr. Perez's brothers were involved with the vehicles.

[ALJ examination] Mr. Zappalla believes the worker's agreement indicates that Zappalla Farms can terminate employment at anytime.

In addition to Mr. Zappalla, his father, Mr. Sam Zappalla, saw the blue van involved in the accident. Mr. Zappalla met with his father in the early morning and afternoon to review operations. Consequently, he doesn't know if his father would have seen the workers coming and going in the vans.

[Re-direct examination] After 1995, Zappalla Farms returned to providing transportation of its migrant farm laborers with passenger vans. The drivers are properly licensed and full time employees of Zappalla Farms. The company does not allow car pooling. By providing their own vehicles, Zappalla Farms was able to ensure proper inspection of the vehicles. The vehicles are properly licensed and inspected. Mr. Zappalla believes their vans have also been reviewed by the Department of Labor. Zappalla Farms has never used DeMay Labor's services again. Now, in the winter they make phone inquiries to obtain good quality crew leaders. After the accident, Zappalla Farms did not continue Mr. Perez's employment.

The worker's hourly rate of \$4.50 was set by Mr. Zappalla and Mr. DeMay.

Complaint For Declaratory, Monetary And Injunctive Relief (ZX 1²⁹)

The complaint, filed March 10, 1997, seeks compensation, cumulatively in millions of dollars, for the injuries suffered by numerous farm workers in a July 5, 1995 van accidents and the wrongful deaths of two workers in the vehicle due to the defendants' violations of the MSPA. The plaintiffs include Mr. Flavio Diaz, Mr. Salvador Gonzalez, Mr. Ufrano Lopez, Mr. David Lopez, and Mr. Remigio Tzoc. The plaintiffs also presented separate causes of action under New York law. The named defendants are Zappalla Farms, James, Samuel and John Zappalla, Long View Fruit Farms, DeMay Labor, Mr. Clifford DeMay, Mr. Nemias Perez, and Mr. Amilcar Roblero.

Hourly Wage Summary, Payment Record and Paycheck (ZX 2)

This document records the work of Mr. Perez's crew at Zappalla Farms for the week of July 2, 1995. Mr. Perez received a 13% commission on the crew's gross pay of \$4,095 in the amount of about \$532. DeMay Labor's 3% commission amounted to \$122. Throughout the week, Mr. Freddy Roblero worked with the crew and he received a paycheck, dated July 14, 1995, in the amount of \$217.19, which he cashed on July 14, 1995.

Document in Spanish (ZX 3)

Dated March 15, 1995, this document is signed by Mr. James Zappalla. (In his sworn testimony, Mr. Zappalla interpreted, without objection, some of the document's provisions.)

DOL Form WH-518 (DX 1)³⁰

The form lists numerous violations of the Act, with corresponding suggested fines. For unsafe transport, the form suggests a \$400 penalty.

For Respondent Nemias Perez³¹

Photographs of a Van (PX 1 and PX 2)

²⁹This pleading was initially not to be marked as an exhibit but entered into the record (TR, page 14); however, Judge Morin subsequently marked the document "Zappalla 1" (ZX 1) and admitted it into evidence (TR, page 57).

³⁰Although this document was offered by, and admitted on behalf of, the dismissed respondent, DeMay Labor, the form is part of the record and relevant on the analysis of the penalties' reasonableness.

³¹Mr. Perez's sworn testimony was presented as part of the Administrator's case-in-chief, see page 10.

A side and rear view of a blue two tone Ford Club Wagon van. The van has tinted windows on the side and rear doors and carries a South Carolina license plate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As a first step in the analysis, I set out a stipulation of fact and make specific findings of fact. As noted by the ARB upon consideration of my Preliminary Decision and Order on Partial Findings, most of the facts in this case are not in dispute.³² As a result, with the exception of factual disputes raised by the evidence presented by Zappalla Farms in the March 2002 hearing, I incorporate and repeat here my findings in the Preliminary Decision and Order. Where pertinent, I will address evidentiary and probative weight issues associated with particular factual determinations raised. The evidentiary discussion and conclusions will appear in double bold brackets - [[]]. Any change to the findings set out in the Preliminary Decision and Order, or new findings upon consideration of the evidence from the March 2002 hearing will be highlighted by strikeout and *italics*.

Stipulation of Fact

At the September 1999 hearing, the parties stipulated that the trailer occupied by Mr. Nemias Perez was owned by Zappalla Farms (TR, pages 675 and 676).

Specific Findings

In 1990, Mr. Nemias Perez, a citizen of Guatemala, came to the United States as a migrant farm worker. While working in New York around 1991, he first met Mr. Clifford DeMay. When he returned again to New York in 1994, he started working in Mr. DeMay's fields. Eventually, he told Mr. DeMay³³ that he was interested in working as a crew leader. Mr. Perez had little understanding of the legal ramifications of being a crew leader or farm labor contractor. In 19975, Mr. DeMay spoke to him in English and Spanish. Mr. Perez didn't let Mr. DeMay know he had trouble understanding him. At the 1997 hearing, Mr. Perez understood some English but couldn't read the language.

On August 18, 1994, Mr. Perez signed a farm labor contract application (AD 14). He was assisted in the process of completing the form by a DeMay Labor representative. This person asked Mr. Perez questions and recorded his answers on the form. Mr. Perez requested authority to recruit, solicit, hire, employ, furnish and pay migrant workers. He indicated that he would not drive the workers or provide transportation. The application was approved for the period August 27, 1994 to August 31, 1995 (AD 14 and AD 27). Under the terms of the approved application, Mr. Perez was not authorized to house, transport, or drive migrant farm workers.

³²ARB Final Decision and Order, August 29, 2001, page 4.

³³Mr. Clifford DeMay was also a farm labor contractor authorized to perform all functions including the transportation of workers (AD 13).

After the 1994 growing season, Zappalla Farms lost its crew leader. In January 1995, Mr. James Zappalla, as president of Zappalla Farms, informed Mr. DeMay that his farm would need 15 workers for the spring growing season (AD 47). He proposed an hourly wage of \$4.50 with a 7% crew leader charge paid by Zappalla Farms to cover "transportation and supervision of crew." DeMay Labor would receive 3% to cover paperwork. At a subsequent meeting, Mr. DeMay and Mr. Zappalla agreed to the hourly rate with a supplemental piece rate. Mr. DeMay indicated that he had been successful with car pooling by workers. He also recommended Mr. Perez as a crew leader.

On March 8, 1995, Mr. Clifford DeMay took Mr. Nemias Perez to a meeting with Mr. Jim Zappalla to discuss the upcoming growing season. Zappalla Farms had engaged DeMay Labor to provide a constant work force for the upcoming growing season. Prior to the 1995 growing season, Zappalla Farms had obtained its own workers and provided transportation. Mr. Perez agreed with Mr. DeMay that Mr. Perez would work for Zappalla Farms. Although in Mr. Perez's experience, farmers provide transportation, he was told that the Zappalla Farms' workers needed their own transportation. At the end of the meeting, Mr. Perez understood: 1) Mr. Zappalla would be his supervisor; 2) Mr. Perez would be the crew leader; 3) Mr. Perez was to recruit and furnish 20 workers for Zappalla Farms; 4) the workers in the crew were responsible for their own transportation; 5) the workers would begin in April 1995 with a starting hourly wage of \$4.50; and, 6) Mr. DeMay would take care of the necessary paperwork. About this time, Mr. Jim Zappalla told Mr. Perez that Mr. Perez was responsible for transporting the workers to and from the fields. For his work, Mr. Perez was promised a wage set as 13% of the workers' total wages. Zappalla Farms would provide housing, payroll and supervision.

On March 9, 1995, Mr. Clifford DeMay and Mr. Jim Zappalla commemorated their understanding of the March 8, 1995 meeting in writing and signed the document (AD 23). DeMay Labor agreed to take care of Mr. Perez's licensing, the disclosure statement for potential workers and the subsequent employment documentation. DeMay Labor would also help Mr. Perez "replenish/replace workers when necessary." For that work, DeMay Labor would receive 3% of the workers' gross wages. The document indicates Mr. Nemias Perez will provide a crew of 20 workers to Zappalla Farms. Mr. Perez will be supervised by Mr. Jim Zappalla. *Concerned that the primary plan of car pooling may not work, Mr. Zappalla and Mr. DeMay add a provision that* In addition Mr. Perez "will also be responsible to make sure the workers have a means to get to work, if Nemias has to supply transportation, he will become properly licensed and the vehicle properly licensed to do this activity." For his role, Mr. Perez would receive 13% of the worker's gross wages.

Following the March 8, 1995 meeting, a work conditions disclosure statement in Spanish was prepared (AD 25 and ZX 3). The form, dated March 15, 1995, sets out the hourly wage, and indicates that each worker is responsible for his or her transportation, and states that Zappalla Farms would not be responsible for accidents or injuries during the course of worker's transportation. The form discloses that the employer is not responsible for transportation. In addition, the "ranchero," identified as Mr. Jim Zappalla, reserved the right to terminate a worker's employment.

On March 10, 1995, Mr. Perez signed a second farm labor contract application (AD 15). Again, DeMay Labor assisted him. Also once again, Mr. Perez requested authority only to recruit, solicit, hire, employ, furnish and pay migrant workers. He indicated that he would not drive the workers or provide transportation. The application was eventually approved for September 1, 1995 to August 13, 1997.

In accordance with Mr. DeMay's instructions, Mr. Nemias Perez then contacted several individuals, including Mr. Freddy Roblero (Perez) in Florida, and asked them to find workers for Zappalla Farms. At the same time, he sent the Spanish disclosure forms (AD 25) about the Zappalla Farms employment conditions to Florida. The disclosure form indicates that each worker must make his or her transportation arrangements.

Around the beginning of April 1995, DeMay Labor started paperwork to register Mr. Nemias Perez as a farm labor contractor authorized to provide transportation (AD 32). However, upon observing the poor condition of Mr. Perez's brown van, DeMay Labor decided not to submit the application. Mr. DeMay told Mr. Perez not to drive workers in his vehicle. Instead, the workers were to use their own cars. During this same time period, Mr. Nemias Perez moved into a trailer owned by Zappalla Farms.

On April 10, 1995, Mr. Nemias Perez signed a New York document indicating that he did not need workers' compensation insurance because Zappalla Farms would provide coverage (AD 29). Under his signature, Mr. Nemias Perez's title is listed as "farm labor contractor."

In the spring of 1995, after hearing from Mr. Nemias Perez about the labor contract, Mr. Freddy Roblero drove about 12 migrant farm workers from Indiantown, Florida to Oswego, New York for the purpose of working in the Zappalla Farms' onion fields. He charged the workers (including Mr. Salvador Gonzalez, Mr. Aldolfo Perez, Mr. Porfidio Gonzalez, Mr. Meliton Velasquez) \$120 to \$150 a person for the trip. Initially, they stayed a few days in a DeMay Labor field camp. Within the first few days of their arrival, on April 4, 1995, Mr. Freddy Roblero took several workers to Mr. DeMay's house where Mr. Clifford DeMay and Ms. Janette Nevlezer, as authorized representatives of Zappalla Farms, assisted them in completing the necessary employment paperwork provided by Mr. DeMay.³⁴ Since the forms, INS Form I-9 and state and federal and tax withholding certificates (AD 46), were in English, most of the workers just signed them. The workers also watched a movie on safety.

About the same time, also in Indiantown, Florida, Mr. Ufrano Lopez heard about a job opportunity in New York. He also traveled to New York and initially stayed in Mr. Nemias Perez's

³⁴The following workers signed their employment documentation (AD 22 and AD 46) on April 4, 1995: Mr. Meliton Velasquez, Mr. Luis Roblero, Mr. Amilcar Roblero, Mr. Alberto Gonzalez, Mr. Adon Ramirez, Mr. David Perez, Mr. Daniel Perez, Mr. Aldolfo Perez, Mr. Salvador Gonzalez, Mr. Porfidio Gonzalez, Mr. Andres Escalante, Mr. Dagoberto Roblero, Mr. Freddy Roblero, and Mr. Ernesto Velasquez. Mr. Leobardo Perez completed his documentation with Mr. DeMay's assistance on April 11, 1995 (AD 22).

trailer. After he started working in the Zappalla Farms' opinion fields around May 1995, Mr. Lopez moved from the trailer to the Los Coyotes farm camp.

Later in the season, on May 8, 1995 and June 12, 1995, after other workers had arrived, Mr. Clifford DeMay, again as an authorized representative of Zappalla Farms, assisted the new workers with similar employment documentation (AD 22 and AD 46).³⁵

During the first part of May, Mr. Nemias Perez, his two brothers, Mr. Amilcar Roblero and Mr. Leobardo Roblero, and his uncle, Felix, were living in the trailer provided by Zappalla Farms, near the_company's central office. Mr. Nemias Perez did not charge his relatives rent. The trailer was not permitted to house any other migrant farm workers. When about eight migrant workers, including Mr. Remigo Mendoza, stayed with Mr. Perez in the trailer on Pollard Road at the beginning of the season, he did not charge them rent. Mr. Jim Zappalla became aware that migrant farmers, other than Mr. Perez' immediate family, were staying in the trailer without proper authorization or permits. He warned Mr. Perez that the workers were not authorized to live in the trailer. When DeMay Labor took no action to correct the housing situation after Zappalla Farms complained about the problem, Zappalla Farms charged Mr. Nemias Perez \$5 for each worker as an economic incentive for him to correct the situation.

Each week, from April 6, 1995 through July 1, 1995, Zappalla Farms paid DeMay Labor at the rate of 3% of the migrant farmers' wages (AD 18, AD 31, and ZX 2). Likewise, Mr. Perez received a 13% commission based on the crew's weekly gross wages (ZX 2). Zappalla Farms kept payroll records for each worker and deducted appropriate Federal, State and FICA taxes (AD 19 and AD 21). The workers received an hourly wage of \$4.50 and were paid by check (AD 19, AD 21, and AD 24). Zappalla Farms also provided workers' compensation liability insurance coverage (DX 29). The migrant farmers typically worked in onion fields six days a week (AD 47).

Zappalla Farms conducts farming operations on between 400 and 600 acres spread over two counties in multiple fields. After they started working in the onion fields at \$4.50 per hour, most of the workers resided in two Zappalla Farm work camps, Campo de Los Coyotes and Los Bombilla (AD 33). Most of the workers did not have driver's licenses, their own vehicles, or access to viable public transportation. Consequently, they traveled 10 to 30 minutes to and from their residences and the Zappalla Farms' onions fields, which were dispersed and separated by many miles, in a variety of vehicles during the course of their employment from April to July 5, 1995. The workers used several vehicles for their transportation.

Mr. Freddy Roblero had a two-tone blue van, which he used to drive workers from Indiantown, Florida to Oswego, New York. The large van had multiple passenger seats and corresponding seat belts. It had the capacity for about 14 passengers. During the month of April and

³⁵The following workers signed their employment documentation (AD 22 and AD 46) on May 8, 1995: Mr. Flavio Diaz, Mr. Jose Velasquez, Mr. Remigo Tzoc, Mr. Jani Lopez, Mr. Ufrano Lopez, Mr. Marco Solis, and Mr. Elvis Vasquez. Mr. Felix Roblero completed his paper on June 12, 1995 with Mr. DeMay's assistance.

first week in May, because Mr. Nemias Perez was having problems with his vehicles, Mr. Freddy Roblero drove the workers in his own two-tone blue van to the fields. He drove the workers to numerous fields based on Mr. Perez's instructions. Mr. Nemias Perez sometimes gave Mr. Freddy Roblero gas money. Then, Mr. Roblero had to return to Florida.

[[Mr. Ufrano Lopez stated Mr. Freddy Roblero never transported anyone. But , according to the INS forms and withholding statements, Mr. Ufrano Lopez didn't start working at Zappalla Farms until the second week in May (AD 46). By that time, Mr. Freddy Roblero had already gone back to Florida. At the same time, Mr. Nemias Perez testified Mr. Freddy Roblero did provide some transportation during the first part of the growing season. I find Mr. Freddy Roblero did initially transport workers up to his departure to Florida. Upon his return to New York around mid-June 1995 (AD 18) later in the growing season, Mr. Freddy Roblero did not transport his co-laborers to work.]]

Sometime, later in the season, Mr. Freddy Roblero did return to work at Zappalla Farms. [[Although Mr. Zappalla noted that with the exception of four weeks, Mr. Roblero's van "remained in operation," his testimony does not establish that Mr. Roblero continued to transport workers after his return from Florida. In contrast, in his statement (AD 10), Mr. Roblero indicated that he stopped transporting workers after he returned to New York. On this issue, I consider Mr. Roblero's definitive statement more probative.]] However, he no longer drove other workers to and from the onion fields. Mr. Leobardo Roblero (Perez), a co-worker and Mr. Nemias Perez's brother, brought his white van from Delaware to New York. The white van did not have any rear seats.

[[Although Mr. Aldolfo Perez testified Mr. Leobardo Roblero's white van did have rear seats, I find his testimony is outweighed by the preponderance of the other witnesses familiar with that van, including Mr. Flavio Diaz, that it did not have any rear seats for passengers and pictures of the van showing no rear passenger seats (AD 3).]]

The white van was registered to Mr. Amilcar Roblero. [[Neither Mr. David Zappalla nor Mr. James Zappalla observed Mr. Perez driving any migrant workers in a van or riding as a passenger. However, both of the Zappalla brothers indicated they did not spend a lot of time in the fields with migrant workers. Mr. Perez testified that he did on occasions drive the migrant workers. Additionally, at least one migrant worker, Mr. Flavio Diaz, corroborated Mr. Perez's testimony by indicating the he observed Mr. Perez drive the white van on occasions. On balance, I consider Mr. Perez's corroborated testimony sufficiently probative to establish that on occasion, Mr. Perez did ride with, and drive, some of the migrant farm workers to the fields in a van.]] Mr. Nemias Perez, Mr. Leobardo Roblero and Mr. Amilcar Roblero drove the workers in the van to the Zappalla fields a few times. They had begun using the white van sometime after Mr. Freddy Roblero returned to Florida in May (AD 11) and prior to his return to New York in early June 1995 (AD 10). On June 23, 1995, the white van was involved in an intersection collision, rolled on its side, and consequently,

³⁶At least one migrant worker, Mr. Flavio Diaz, stated that Mr. Nemias Perez had driven the white van.

placed out of commission. The driver of the van fled the scene and was not located (*see* AD 2). The van's two passengers, Mr. Leobardo Roblero and Mr. Julio Herrera, were seriously injured and unconscious at the scene.

Mr. Nemias Perez had a black Brono. Early in the work season, the workers used that vehicle for transportation, but it broke down.

After the departure of Mr. Freddy Roblero and his van in early May 1995 [[According to Mr. Nemias Perez's recollection, his discussion concerning transportation problems with Mr. DeMay and Mr. James Zappalla occurred sometime in May. Mr. James Zappalla believed his conversation occurred in sometime in late June. The actual timing of this event is less important than the finding that due to both the inability to use Mr. Roblero's van and the mechanical breakdown of other vehicles, Mr. Perez had discussions with both Mr. DeMay and Mr. Zappalla and then set about to obtain other transportation for the workers.]]

Sometime after Mr. Roblero's May departure to Florida and prior to early July 1995, due both to the unavailability of Mr. Roblero's van and mechanical problems with other vehicles, Mr. Nemias Perez discussed the workers' resulting transportation problem with Mr. DeMay and Mr. James Zappalla. While Mr. DeMay and Mr. Zappalla suggested Mr. Perez look into car auctions, neither individual Mr. DeMay nor Mr. Zappalla responded to the workers' transportation dilemma. Mr. DeMay said nothing further and Mr. Zappalla described the situation as Mr. Perez's problem. Mr. Zappalla's sole concern was that the workers got to the fields, not how they got there. So, in May or June, 1995, Mr. Nemias Perez, his brother, Leobardo Roblero, and other brother, Mr. Amilcar Roblero, purchased a blue van, Mr. Nemias Perez contributed \$1,500 for the purchase and registered the blue van in his name. On occasions until July 5, 1995, both he and his brother, Mr. Amilcar Roblero, who only had a learner's driving permit, drove the workers, up to 17 or 19 at a time, to and from work in the Zappalla Farms' fields. He drove the workers because they needed transportation. The workers paid Mr. Nemias Perez, Mr. Amilcar Roblero, or Mr. Leobardo Roblero between \$7 to \$15 a week to ride in the van. The van did not have any rear seats so the passengers in the rear rode on overturned buckets and the spare tire.

[[Mr. James Zappalla testified that the blue van involved in the accident was placed into use about two days before the accident. On the other hand, Mr. Perez and other workers indicated that after the white van was placed out of commission by the June 23, 1995 accident, all the workers, including Mr. Nemias Perez, and with the exception of Mr. Freddy Roblero, used the remaining blue van as transportation. I also note that although Mr. James Zappalla may not have seen Mr. Perez riding as a passenger, Mr. Perez's credible testimony and the reduction of the workers' vehicle pool down to one blue van, establishes that Mr. Perez did ride as a passenger in the blue van.]] The blue van was used as transportation for most of the workers, including Mr. Perez as a passenger, for about two weeks before the July 5, 1995 accident (AD 8 and AD 9).

[[Mr. David Zappalla testified that he did not know the blue van had no seats until after the July 5, 1995 accident. Likewise, Mr. James Zappalla apparently never knew about the unsafe

condition of the paneled blue van. However, Mr. Perez stated that one of the Zappalla brothers did warn Mr. Perez about the unsafe condition of the van. Since Mr. Sam Zappalla and Mr. John Zappalla were also "brothers," and considering that Mr. David Zappalla indicated that his father, Mr. Sam Zappalla did mention the unsafe condition to workers, I conclude that one of the Zappalla Farms partners, Mr. Sam Zappalla, was aware of the worker's use of an overcrowded van for transportation to and from the Zappalla Farms' fields and observed Mr. Perez's riding in the van. Mr. Sam Zappalla also talked to Mr. Perez about the overcrowding situation.]]

One of the Zappalla brothers, *Mr. Samuel Zappalla*, observed *Mr. Perez riding in the blue van and its overcrowded condition*. He warned Mr. Nemias Perez that he was putting too many people in the van; it was overcrowded and unsafe.

[[Mr. David Zappalla and Mr. James Zappalla spent most of their time working other aspects of the farm operations and did not spend a great deal of time in the fields with the migrant workers. However, they did on occasion see the workers at the fields and observed their vehicles parked at the field boundaries. I also note the both Mr. Sam Zappalla and Mr. John Zappalla may be characterized as "a Zappalla family member."]]

Due to the location of the work camps in relation to the onion fields, the migrant farm workers would travel on public roads, including State Road 104 and State Road 6 (Mr. Gonzalez and AD 4). Typically, when the migrant workers arrived at an onion field, a Zappalla family member, including Mr. Sam Zappalla, Mr. David Zappalla, and Mr. Jim Zappalla, would be waiting for them and see their arrival. The migrant farmers weeded and treated the fields and planted onions. If they finished work in one field early, they would travel to another field based on directions from Mr. Nemias Perez. And, on some occasions, they followed Mr. Sam Zappalla to another field. Many of the Zappalla Farms' fields were separated by many miles. In the fields, Mr. Nemias Perez served as the workers' supervisor. However, he took directions from one of the Zappalla family members, who usually followed the workers around in the field, and relayed the instructions to the workers in Spanish or English. If English was used (Mr. Jim Zappalla speaks only a little Spanish), Mr. Perez would do basic translation and give the farming instructions to the workers in Spanish. Mr. Perez recorded each worker's daily hours on daily time sheets (ZX 2).

In the late afternoon, early evening of July 5, 1995, 19 migrant farm workers, including Mr. Nemias Perez, entered the blue van registered to Mr. Nemias Perez, at a Zappalla Farms' field. Mr. Sam Zappalla, through the van's open rear door, told Mr. Perez to have the workers leave due to rain. At that time, all the workers were already in the van. They then started in the van to return to their residences. Mr. Freddy Roblero departed the same field alone, in his own van. The blue van carrying all the other migrant farm workers first stopped to drop off Mr. Nemias Perez and another worker at the trailer on Pollard Road. Then, Mr. Amilcar Roblero drove the van down Route 104 when he lost control of the vehicle due to unsafe weight load, swerved off the road and stuck a tree. The collision bent the van in half and killed Mr. Alberto Gonzalez, Mr. Andres Escalante, and Mr.

Dagoberto Roblero. Several other migrant farm worker passengers suffered serious injuries.³⁷ Eventually, the driver of the blue van, Mr. Amilcar Roblero, was convicted of three traffic offenses: unlicenced operator, overweight vehicle, and speeding (AD 38).

Other than Mr. Nemias Perez, none of the workers mentioned any problems with transportation to the Zappallas.

As a result of the accident, Mr. Salvador Gonzalez, Mr. Ufrano Lopez, Mr. Flavio Diaz, Mr. David Lopez, and Mr. Remigio filed a multi-million dollar lawsuit against Zappalla Farms, James, Samuel and John Zappalla, DeMay Labor, Mr. Clifford DeMay, Mr. Nemias Perez and Mr. Amilcar Roblero (ZX 1).

During their investigation of the accident for potential violations, Mr. Thomas Ford and Mr. Joseph O'Connor used Rural Opportunities, a migrant farm workers advocacy group, to locate some of the accident victims. Considering the three deaths and the number of serious injuries due to the accident, the Administrator assessed the maximum penalty by applying the \$1000 fine for each migrant worker, as defined by the regulation, in the van at the time of the July 5, 1995 accident.

During their post accident investigation, Mr. Ford and Mr. O'Connor determined that the two labor camps operated by Zappalla Farms fully complied with the DOL regulations and were in good condition.

Following the 1995 season, Zappalla Farms returned to its customary practice of providing transportation for its migrant workers. The company employs properly licensed drivers who transport the workers in properly inspected and licensed passenger vans. After the accident, Zappalla Farms did not continue Mr. Perez's employment and the company has never again used the services of DeMay Labor.

Issue No. 1 - Mr. Perez's Farm Labor Contractor Status

The Act, 29 U.S.C. § 1802 (7), and implementing regulation, 29 C.F.R. §500.20 (j), defines the term "farm labor contractor" as "any person – other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association – who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity." Such activity is further defined at 29 C.F.R. §500.20 (i) as "recruiting, soliciting, hiring, employing, furnishing or transporting" migrant farm workers. Mr. Perez's professed

³⁷Mr. Adolfo Perez sustained head, leg and waist injuries. Mr. Salvador Gonzalez suffered some memory loss and multiple bone fractures in his legs and ankles. Mr. Flavio Diaz broke his leg and sustained chest and abdominal injuries. Mr. Ufrano Lopez punctured his stomach and stayed in a coma for one week. Mr. Remigio Mendoza broke his back and sustained head, arm and leg injuries with corresponding memory loss. And, Mr. David Perez suffered a head injury, spent two months in a coma, and sustained some memory loss.

ignorance of these regulatory definitions and requirements does not relieve him of his responsibilities under the Act. *See Stewart v. Everett*, 804 F. Supp. 1494, 1498 (M.D. Fla. 1992).

As discussed in greater detail in the Preliminary Decision and Order, Mr. Perez agreed with Mr. DeMay and Mr. James Zappalla to supply a farming crew for Zappalla Farms. During that process, Mr. Perez both solicited and recruited workers for a farm crew from Florida. He accomplished these farm labor contractor activities of soliciting and recruiting for a 13 % commission of the base wages of the farm crew. Mr. Perez also signed two applications to become a farm labor contractor (AD 14 and AD 15), which were subsequently approved (AD 27 and AD 28). Clearly, Mr. Perez's functions in regards to the Zappalla Farms' migrant farm workers and the corresponding payment arrangement satisfy the regulatory requisites for the status of farm labor contractor.

During the initial proceeding, in defense of being held a farm labor contractor, Mr. Perez indicated that he had no intention of becoming a farm labor contractor and, due to language barriers, did not understand the contract and farm labor contractor applications. Again, in greater detail in the Preliminary Decision and Order, I found these representations insufficient to excuse Mr. Perez's from being designated a farm labor contractor. Mr. Perez had sufficient command of the English language to act as an interpreter for the migrant workers. Additionally, since Mr. DeMay was involved with the preparation of the necessary paperwork for a farm labor contractor designation, he was readily available to help Mr. Perez understand any provisions in the application. Consequently, with both the ability and opportunity to understand that he was becoming a farm labor contractor, Mr. Perez should not be released from the obligations of a farm labor contractor and the consequences of failing to met those standards.

In the Preliminary Decision and Order, I determined that Mr. Perez was a farm labor contractor under the Act. Since Mr. Perez did not appear at the March 26, 2002 hearing, in the absence of any new evidence relevant to that determination and for the reasons noted above, I continue to find that Mr. Nemias Perez was a farm labor contractor for Zappalla Farms during the onion growing season of 1995.

Issue No. 2 - Housing of Migrant Workers - Mr. Nemias Perez

To ensure the safety and health of migrant farm workers in relation to their housing, the statute imposes several requirements on individuals who provide or control such housing. Section 101 (a) of the Act, 29 U.S.C. § 1811 (a), requires that a farm labor contractor obtain a certificate of registration for housing workers prior to engaging in that activity. Next, Section 102 (3), 29 U.S.C. § 1812 (3), requires that a person file a housing application which both identifies the housing and confirms its compliance with the Act. Finally, Section 203 (a), 29 U.S.C. § 1823 (a) requires that a person who controls migrant housing ensure that the housing complies with Federal and State safety and health standards.

On August 16, 1995, the Administrator assessed Mr. Perez a civil monetary penalty of \$400 for violations of Section 101 (a) and Section 102 (3) (registration violations) (AD 43). The

Administrator imposed an additional \$200 penalty for violation of Section 203 (a) (safety and health compliance). Notably, at the start of each cited violation, the Administrator included a specific number that corresponded to the violation number on the Form WH-518, which sets out penalty assessment totals (DX 1). For example, the Administrator's citation for the registrations violations states: "26. Housed workers without certificate authorization - Sec. 101 (a) and Sec. 102 (2) \$400.00." On the Form WH-518, Violation Number 26 is captioned, "Housed workers without certificate of authorization." The corresponding penalty is set at \$400. The same form also indicates a penalty up to \$1,000 may be appropriate for failing to ensure housing safety and health, which is Violation Number 12 (DX 1). A footnote on the form further states the penalty should be reduced by 50% if the violation is not "aggravated, willful, or recurring."

Mr. Perez admitted that during the growing season of 1995, he permitted up to eight migrant workers, besides his family members, to reside in the trailer he was occupying on Pollard Road. At least two workers, Mr. Velasquez and Mr. Lopez, corroborated that admission. Likewise, Mr. James Zappalla discovered the presence of several workers in the trailer and attempted to stop the practice by increasing rent. Nothing in the complete record alters a finding that Mr. Perez allowed migrant farm workers to live in a trailer that he rented and controlled. Further, in his farm labor contractor application, Mr. Perez did not seek authority to house workers. Similarly, Mr. Perez neither filed the requisite certificate of registration of migrant farm worker housing nor ensured that the trailer complied with Federal and State safety and health standards.

While I have considered Mr. Perez's possibly benevolent reasons for allowing the workers to live with him, his decision was willful. In addition, suitable migrant farm worker housing was available at two designated migrant worker camps on Zappalla Farms. Based on these uncontested findings, the combined assessed penalty of \$600 for these willful violations is appropriate.

Issue No. 3 - Transportation of Migrant Farm Workers - Mr. Nemias Perez

Again, to enhance migrant farm worker safety, under Section 101 (a) and Section 102 (2), 29 U.S.C. §§ 1811 (a) and 1812 (2), the Act also applies registration and identification requirements to the transportation of migrant farm workers. Additionally, Section 401 (b) (1) (B), ³⁸ 29 U.S.C. § 1841 (b) (1) (B), requires a farm labor contractor ensure that only a driver with a valid and appropriate license transports migrant farm workers.

On August 16, 1995, citing Section 101 (a) and Section 102 (2), the Administrator imposed a civil monetary penalty of \$1,000 on Mr. Perez for transporting migrant farm workers without proper registration of that farm labor contractor activity and identification of the vehicles (AD 43). An additional \$200 penalty was imposed under Section 401 (b) (1) (B) because "You operated a vehicle used to transport workers without a current Certificate of Registration which indicated that driving was authorized" (AD 43).

³⁸Incorrectly cited in the Administrator's penalty citation as Section 401 (b) (1) (A).

Registration Violations

When Mr. Perez submitted his two applications for farm labor contractor certification, the activities of driving and transporting migrant farm workers were not included (AD 14 and AD 15). His applications apparently reflected the parties' intention that the individual workers would be individually responsible for their own transportation. As Mr. James Zappalla testified, the original plan for transportation was car pooling by the migrant farm workers. The written understanding between DeMay Labor and Zappalla Farms also envisioned a second transportation possibility in light of Mr. Perez's obligation to provide laborers to the Zappalla Farms' fields. If Mr. Perez had to supply transportation, then he would be required to obtain the necessary licenses for himself and vehicles (AD 23).

While Mr. Freddie Roblero's van initially may have represented a legitimate car pool arrangement, Mr. Perez also transported some of the workers in his own vehicle. Due to his status as a farm labor contractor, his actions are sufficient to find that he caused the transportation of migrant farm workers without proper registration of his activity or identification of the vehicles in use.

I have considered that economic pressures and poor vehicle maintenance created a situation in which Mr. Perez apparently felt forced to actively participate in the workers' transportation. However, each of the cited violations involved a willful choice by Mr. Perez. Mr. Perez was well aware of the farm labor contractor registration requirements for transportation based on his agreement with Zappalla Farms, Mr. DeMay's refusal to help him with a transportation certification application based on the poor condition of his van, and Mr. DeMay's specific instruction to not to drive the workers.

Although a penalty for the registration violation is clearly warranted, reference to the Form WH-15 for the appropriate penalty raises an issue. For these registration violations, referencing the violation as "25," the Administrator imposed a penalty of \$1,000. Yet, for Violation Number 25 on the Form WH-15, entitled "Transported workers without certificate of authorization," the corresponding penalty is \$400, not \$1,000. As will be discussed subsequently in greater detail, the statute itself at 29 U.S.C. § 1853 (a) imposes a maximum of \$1,000 for each violation. Consequently, the Administrator's penalty does not exceed that statutory limit.

However, the Form WH-15 must have been developed for some purpose and apparently does set some standards for consistent assessment of penalty. While I assume the penalty was enhanced because of the grave nature of the accident, the Administrator did not provide a specific rationale why more than \$400 was imposed for the registration violations. Additionally, the critical deficiency of Mr. Perez's actions which contributed to the deaths of three migrant workers was not his administrative failure to obtain the requisite registration for transportation. As discussed later, his significant violation was causing the transportation of 17 workers in an unsafe van. I also note that concerning Mr. Perez's failure to ensure the driver transporting workers had a valid license, the Administrator chose the Form WH-15 designated sanction of \$200, rather than a \$1,000 penalty.

Consequently, in light of the nature of Mr. Perez's administrative omission, and for consistency, I believe the penalty set out in the Form WH-15 of \$400 is the more appropriate sanction for this particular violation. Accordingly, the \$1,000 penalty will be modified to \$400.

Driving Violation

In the Preliminary Decision and Order, concerning this violation, I noted a conflict between the stated statutory violation and the underlying facts. Specifically, the August 16, 1995 Assessment of Civil Monetary Penalty states:

14. <u>Failure to ensure driver has valid license - Sec 401 (b) (1) (A) ... \$200.00</u>. You operated a vehicle used to transport workers without a current Certificate of Registration which indicated that driving was authorized.

After jumping over the incorrect statutory citation,³⁹ I went on to address this allegation in terms of Mr. Perez's failure to ensure proper licensing of his brother, Mr. Amilcar Roblero. Since Mr. Amilcar Roblero only had a learner's permit at the time he lost control of the blue van on July 5, 1995, I determined the citation was warranted.

Upon reconsideration, I now find the allegation sufficiently defective to have placed Mr. Perez on proper notice of the purported violation. The reference to violation number 14, which is titled "Failure to ensure driver has valid license," and cited violation certainly draws attention to Mr. Amilcar Roblero's learner's permit and the absence of a proper driver's license for transporting workers. However, the remaining portion of the citation focuses on the Mr. Perez's lack of a Certificate of Registration which authorizes driving migrant workers. I now consider this later portion of the citation, which provides the specific details relevant to Mr. Perez, to be the controlling portion of the intended violation. As such, the cited registration violation is duplicative of the previously discussed registration violations, pertaining to Mr. Perez's transporting migrant farm workers without certification for that farm labor contractor activity. As a result, due to the duplicative nature of the specific charge, this violation and the \$200 penalty should be reversed (dismissed).

 $^{^{39}}$ The cited Section 401 (b) (1) (\underline{A}) requires a farm labor contractor ensure that a vehicle used to provide migrant farm worker transportation conforms to the regulatory requirements for vehicles and other applicable Federal and State safety standards. Section 401 (b) (1) (\underline{B}) requires the farm labor contractor to ensure each driver has a valid and appropriate license.

Issue No. 4 - Use of Mr. Amilcar Roblero and Mr. Freddy Roblero for Farm Labor Contracting Activity - Mr. Nemias Perez

Section 101 (b), 29 U.S.C. § 1811 (b), of the Act prohibits a farm labor contractor from using an individual, who is not registered as either a farm labor contractor or a farm labor contractor employee, to perform farm labor activities, which under the statutory definition, 29 U.S.C. § 1802 (6), includes the transportation of migrant farm workers.

On August 16, 1995, the Administrator cited Mr. Perez for violating Section 101 (b) by engaging the services of Mr. Freddy Roblero and Mr. Almicar Roblero to transport migrant farm workers, without determining whether they possessed certificates of registration as farm labor contractors or farm labor contractor employees. Referencing Violation Number 20, the Administrator imposed a \$600 civil monetary penalty for the violation.⁴⁰

The preponderance of the evidence establishes that Mr. Perez, a registered farm labor contractor, actively participated in the transportation of the workers to the onion fields. As part of his involvement, Mr. Perez reimbursed Mr. Freddy Roblero for the costs of driving workers in his van to the fields. By such payments, Mr. Perez engaged Mr. Roblero to perform the transportation of migrant workers for which Mr. Roblero had no certificate of registration authorizing that farm labor contractor activity. Later in the growing season, Mr. Perez purchased a blue van with Mr. Amilcar Roblero and together they transported workers to the work, with Mr. Amilcar usually driving. As part of this arrangement, Mr. Perez also collected a fee from the workers driven to work by Mr. Amilcar Roblero, who likewise was not registered to perform the farm labor contractor activity of worker transportation. Under this arrangement, Mr. Perez was using Mr. Amilcar Roblero to perform an unregistered farm labor contractor activity.

The Form WH-15 indicates that the penalty for Violation Number 20, failure to register employees, is \$300 for each individual. As previously mentioned, due to his abortive attempt to become registered for the farm labor contractor activity of transportation, Mr. Perez was aware of the registration requirements. The evidence also demonstrates that Mr. Perez obviously did not inquire into the registration status of either driver and neither individual possessed the requisite certificate of registration. Since other migrant workers besides immediate family members rode in the blue van, the immediate family member exemption, 29 C.F.R. § 500.103, is not applicable. Likewise, because Mr. Perez, as a farm labor contractor, actively participated in the transportation arrangement, the car pooling exemption, 29 U.S.C. § 500.103 (c), is not available to Mr. Perez as a defense against the penalty. Consequently, Mr. Perez's use of both Mr. Freddy Roblero and Mr.

⁴⁰This violation is also somewhat problematic because it presents the violation in terms as a failure to inquire about registration status. Whereas, the gravamen of a Section 101 (b) violation is the actual use of an individual for a farm labor contractor activity who does not possess the requisite certificate authorizing the activity. This time however, I believe the stated, specific violation in the citation provided sufficient notice to Mr. Perez.

Amilcar Roblero to transport migrant workers was a willful violation of the Act. Thus, the \$600 penalty for these violations is appropriate.

Issue No. 5 - Failure to Provide Safe Vehicles - Mr. Nemias Perez

Under Section 401 (b) (1) (A) of the Act, 29 U.S.C. § 1841 (b) (1) (A), and the implementing regulation, 29 C.F.R. § 500.104, vehicles used to transport migrant farm workers must comply with regulatory standards and Federal and State safety standards. Two such regulatory standards in this case involve gross vehicle weight and vehicle seats. According to 29 C.F.R. § 500.104 (k), a vehicle must not be driven when loaded beyond the design, or authorized, gross vehicle weight. Additionally, the regulation, 29 C.F.R. § 500.104 (l), requires that each occupant of the vehicle be provided a seat securely fastened to the vehicle.⁴¹

Referencing Violation Number 13, on August 16, 1995, the Administrator imposed a penalty of \$19,000, subsequently amended to \$16,000, for Mr. Perez's violation of Section 401 (b) (1) (A) by using a blue van with only two fixed seats to transport 19 migrant workers, and exceeding the vehicle's gross weight limit of 900 pounds. The penalty citation also included the use of a white van with only two fixed seats to transport migrant workers. The amount of the assessed penalty was later reduced to \$16,000, for each of the sixteen occupants involved in the July 5, 1995 accident other than driver of the blue van, Mr. Amilcar Roblero, who as Mr. Perez's brother, was not considered a migrant worker (Ms. Quinn's testimony). 42

After problems associated with transporting the work crew to the Zappalla Farms became acute sometime in June 1995, Mr. Perez utilized a white van owned by his brother, Leobardo Roblero. This van only had secured seating for two passengers (AD 2 and Mr. Ufrano Lopez's testimony). The workers, usually about 17 people (according to Mr. Ufrano Lopez) who traveled in the van each day to the Zappalla Farms onion fields did not have seating secured to the vehicle. Since the workers were employed up to six days a week and the white van was introduced as a transportation vehicle by early June 1995, this van was used multiple times to transport the workers until it was placed out of commission by the June 23, 1995 intersection accident. Consequently, Mr. Perez's violation of the regulatory safety standard concerning secured seating for the white van is clearly demonstrated.

Due to additional vehicle difficulties, about two weeks before July 5, 1995, a blue van became Mr. Perez's principal means to transport the work crew of about 16 migrant farmers to Zappalla Farms. The blue van did not have more than two secure seats (AD 5 and AD 6). In addition, the transportation of the work crew numbering 16 individuals, who obviously weighed more than 900

⁴¹This provision does not apply if the transportation is provided "primarily on private farm roads" if the distance is less than ten miles, and the trip begins and ends on the property of the same employer, 29 C.F.R. § 500. 104 (k). Since the movement of these vans between the Zappalla Farms' fields occurred on public highways, this exclusion is not applicable.

⁴²An immediate family member of a farm labor contractor is not considered a migrant farm worker. *See* 29 C.F.R.§§ 500.20 (p) (1) (i) and (o)

pounds (the designed gross weight limit for the van), did exceed the vehicle's designed gross weight limit. Unfortunately, the fact the vehicle was overloaded was further vividly demonstrated by Mr. Amilcar Roblero's fatal loss of control of the van on July 5, 1995 and his subsequent traffic conviction for operating an overweight vehicle (AD 38). In regards to the blue van, the charged safety violations are clearly established.

While no question exists as to Mr. Perez's failure to provide safe transport vehicles, the validity of the imposed \$16,000 penalty does require some evaluation. The Form WH-15 indicates that the penalty for failure to provide safe transport vehicles is \$400. Additionally, of the thirty numbered violations listed on the form, only three offenses carry the annotation "ea" in the recommended penalty column to indicate the penalty is attributable per person. In other words, when a per person assessment is deemed appropriate, the form sets out the recommend penalty and the notation "ea." Significantly, the form indicates that for Violation Number 29, engaging illegal aliens, the penalty is "\$400 ea" and the "total may exceed \$1,000." By comparison, the penalty for failure to provide safe transport does not contain the "ea" annotation which seems to indicate the focus of this particular violation is the vehicle and not the number of passengers in it.

Despite the designated penalty set out in the Form WH-15 for this violation, the Administrator imposed \$1,000, the maximum penalty under the statute, 29 U.S.C. § 1853 (a) (1), for each of the 16 migrant workers, other than Mr. Amilcar Roblero, involved in the July 5, 1995 accident. Observing the Form WH-15 is only a guide and considering the gravity of the violations and the obvious grievous consequences of the inadequate seating and overloading, the Administrator asserts the total penalty, based on each affected workers, is both legally justified and appropriate. Zappalla Farms, which was also assessed a cumulative penalty for the same violation, maintains that the focus of the Form WH-15, and the cited violation, is the vehicle. Thus, the maximum permissible, combined penalty for use of the unsafe white van and blue van is \$2,000.

Although I will more fully address Zappalla Farms' concerns about the large penalty for this type of violation, I need not linger long on the per worker assessment issue for three reasons. First, the implementing regulation, 29 C.F.R. § 500.143(b) (2), requires that as part of the penalty assessment process, the Administrator, on behalf of the Secretary of Labor, consider the number of workers affected by the violation. Second, at least one court has considered this issue, in relation to a predecessor migrant worker protection statue, and upheld a per worker penalty assessment, *see Counterman v. U.S. Dept. of Labor*, 607 F. Supp. 286 (W.D. Tex. 1985), *aff'd*, 776 F.2d (5th Cir. 1985). Third, another completely separate reason for a cumulative penalty exists based on Mr. Perez's prolonged practice of using these two unsafe vehicles for migrant farm worker transportation. Notably, Mr. Perez certainly used the unsafe white van twice a day, six days a week, for several weeks. He also employed the blue van for worker transportation another two weeks prior to the July 5, 1995 with the same frequency. Each time either one of these vehicles was used to transport more

⁴³For Violation Number 16, utilizing the services of an unregistered farm labor contractor, the recommended fine is "\$1,000 ea." Violation Number 20, failure to register an employee, carries a fine of "\$300 ea."

than two migrant farm workers, a violation of the Section 401 (b) (1) (A) occurred. Thus, within the context of the multiple, unsafe uses of the vehicles over an extensive period of time, the Administrator did not abuse his discretion by assessing a cumulative \$16,000 fine against Mr. Perez.

In addition to the existence of a violation, the Act also requires that the Administrator evaluate the previous record of the named violator in terms of prior compliance with the Act and the gravity of the violation, 29 U.S.C. § 1853 (a) (2). The implementing regulations provide further guidance on this process. According to 29 C.F.R. § 500.143 (b), in addition to prior compliance and gravity of the violation, including the number of affected workers, the Administrator must also consider good faith effort to comply with the Act, the explanation for the violation, commitment to future compliance, and financial gain associated with the violation.

Applying these statutory and regulatory considerations to Mr. Perez's case, Mr. Perez explained that he did not really understand his obligations as a farm labor contractor and when he turned to Mr. DeMay and Zappalla Farms about his transportation problem, his requests for help were rebuffed. On the other hand, even if Mr. Perez really did not understand all the regulatory technicalities associated with his title of farm labor contractor, Mr. Perez was the crew "boss" who crowded 16 of his workers in the back of a van with no seats. The unsafe nature of that arrangement, especially in the hands of a driver with a learner's permit, should have been readily apparent to Mr. Perez. Additionally, since Mr. Perez's compensation depended on the number of workers provided to Zappalla Farms and considering his apparent limited financial resources, Mr. Perez did recognize a gain by getting the crew to the fields in one van without having to provide potentially more expensive vehicles that met safety standards. Ultimately, Mr. Perez has presented insufficient extenuating and mitigating circumstances in contrast to the gravity of his multiple violations, which eventually killed three migrant farm workers and seriously injured several other members of his work crew, to warrant a downward reduction in the assessed penalty. Accordingly, I find the penalty assessment of \$16,000 for failure to provide safe vehicles for the transportation of migrant farm workers is appropriate.

Issue No. 6 - Transportation of Migrant Farm Workers in Unsafe Vehicles - Zappalla Farms⁴⁴

As previously discussed above, Section 401 (b) (1) (A) of the Act requires that vehicles used for migrant farm worker transportation comply with various safety standards. The same provision levies this requirement on an agricultural employer or association "when using, or causing to be used," such vehicles. The corresponding regulation, 29 C.F.R. § 500.100 (a) specifically explains that if an agricultural employer causes to be used a vehicle for the transportation of migrant farm workers, then the agricultural employer is responsible for ensuring the vehicle's conformance to safety standards. Again, two of those standards, secured seating and vehicle load limitation, are established

⁴⁴Although Zappalla Farms appealed the determination in my Preliminary Decision and Order that it was liable for the vehicles' safety violations, the Administrative Review Board limited its review to the sufficiency of my findings and conclusions concerning DeMay Labor.

by 29 C.F.R. §§ 500.104 (l) and (k).

Although the Act does not define the parameters of the phrase, "using, or causing to be used," the regulation at 29 C.F.R. § 500.100 (c) explains that the phrase:

does not include car pooling arrangements made by the workers themselves, using one of the workers' own vehicles. However, car pooling does not include any transportation arrangement in which a farm labor contractor participates or which is specifically directed or requested by an agricultural employer or agricultural association.⁴⁵

Another regulatory section, 29 C.F.R. § 500.70 (c), also explains that, with the exception of workers' car pool arrangements, responsibility of vehicle safety compliance rests with the person, or persons, "using or causing to be used," the vehicle for worker transportation. The same section specifically adds that an agricultural employer is <u>not</u> responsible for a farm labor contractor's failure to comply with the vehicle safety standards, <u>unless</u> the "agricultural employer or agricultural association specifically directs or requests a farm labor contractor to use the contractor's vehicle to carry out a task for the agricultural employer or agricultural association." In that situation, the agricultural employer and the farm labor contractor are jointly responsible for any vehicle safety deficits.

A final regulatory phrase, potentially relevant to Zappalla Farms' situation, states that when a person uses a farm labor contractor, that person is required to take reasonable measures to ensure that the vehicle used by the farm labor contractor is properly authorized, or registered, for use in transporting migrant farm workers. 29 C.F.R. § 500.70 (c).

Referencing Violation Number 13, on August 16, 1995, the Administrator imposed a penalty of \$19,000, subsequently amended to \$17,000, for Zappalla Farms' violation of Section 401 (b) (1) (A) by failing to provide safe transportation for migrant workers. The Administrator alleged Zappalla Farms used, or caused to be used: a) a blue van with only two fixed seats to transport 19 migrant workers, exceeding the vehicle's gross weight limit by 900 pounds; and, b) a white van with only two secured seats to transport the worker crew (AD 44). The amount of the assessed penalty was later reduced to \$17,000, for each of the seventeen occupants involved in the July 5, 1995 (Ms. Quinn's testimony).⁴⁶

The safety violations contained in the Zappalla Farms' penalty citation are the same vehicle safety hazard violations cited against Mr. Perez. Since I have already determined the preponderance of the evidence establishes that these safety violations existed, the central issue concerning this

⁴⁵See also 29 C.F. R. § 500.103 (c) which reiterates that vehicle safety standards of the Act do not apply to car pool arrangements made by the workers, using one of the workers' vehicles.

⁴⁶In relation to Zappalla Farms, Mr. Amilcar Roblero was also a migrant farm worker and thus included as one of the workers affected by the safety violations.

particular penalty assessment is whether Zappalla Farms bears any responsibility, and corresponding liability, under the Act for Mr. Nemias Perez's use of the two unsafe vans to transport migrant workers.

Based on the circumstances in this case concerning the migrant workers' transportation, and as argued by Zappalla Farms in its closing brief, the plain language of the regulation seems to insulate Zappalla Farms from any liability concerning the conditions of the vans used by its farm labor contractor, Mr. Perez, to transport the migrant workers. As the parties intended by their contract before the growing season and then acted during the summer, Mr. Nemias Perez, as the farm labor contractor, was solely responsible for ensuring the workers were in place in the onion fields. That contractual provision, especially in light of the language of 29 C.F.R. § 500.70 (c), did not amount to "directing" Mr. Perez about transportation. Even when Mr. Perez brought his vehicle breakdown problems to the other parties' attention, both Mr. DeMay and Mr. James Zappalla reiterated that transportation was solely his problem. Thus, unless Zappalla Farms somehow directed, or caused, the use of Mr. Perez's vehicles, 29 C.F.R. § 500.70 (c) seems to indicate that Zappalla Farms, as the agricultural employer, does not bear any responsibility for vehicle safety compliance violations by its farm labor contractor, Mr. Perez. In that regard, even if Mr. James Zappalla gave Mr. Perez advice to consider an auction to obtain a vehicle after transportation problems surfaced, that exchange did not rise to the level of causing Mr. Perez to use unsafe vehicles to transport the work crew.

In my Preliminary Decision and Order, based on the circumstances set out above, I concluded that DeMay Labor did not sufficiently direct Mr. Perez to become responsible for Mr. Perez's transportation safety failures. When the ARB subsequently reviewed those conclusions, the board members upheld my determinations indicating that neither the contract provisions nor Mr. DeMay's contact with Mr. Perez about transportation problems established that DeMay Labor "caused" migrant workers to be transported in unsafe vehicles (ARB Final Decision and Order, August 29, 2001, page 10).

The same conclusions also apply to Zappalla Farms. That is, neither the parties' contract, nor the contact about transportation woes, provide a sufficient basis to conclude Zappalla Farms directed or caused Mr. Perez's use of the unsafe vehicles. However, in regards to Zappalla Farms, in my Preliminary Decision and Order, I found that other aspects of its relationship with Mr. Perez did provide a basis for holding Zappalla Farms accountable for the unsafe transportation of the farmers who worked in its onion field. Based on synthesis of several court cases, I specifically found Zappalla Farms caused the unsafe vehicles to be used under two other rationales: a) necessity of transportation and b) joint employer.

Necessity of Transportation

Prior to re-addressing this basis for liability, a review of the relevant cases is helpful.

In Avila v. A. Sam & Sons, 856 F. Supp. 763 (W.D.N.Y. 1994), the agricultural employer hired a crew leader who transported migrant farmers to the employer's fields even though he was not

licensed or registered to provide that transportation. In light of that arrangement and without explanation, the judge concluded the crew leader was a farm labor contractor and the employer had violated 29 U.S.C. 1841 (b) (1) by using, or causing to be used, the farm labor contractor's van to transport workers to and from the employer's fields. *Id.* at 772.

In *Alviso-Medrano v. Harloff*, 868 F. Supp. 1367 (M.D. Fla. 1994), the magistrate granted a motion for summary judgment in favor of the defendant agricultural employer because the employer did not cause the accident vehicle to be used. In this case, the farm labor contractor made available suitable and authorized transportation for the workers. However, as a favor to a co-worker, a new worker transported several fellow workers to work in his van and had an accident. Neither the employer nor the farm labor contractor knew the new worker and consequently did not direct the use of his van. Thus, the employer and farm labor contractor were not held liable for something beyond their control. Additionally, the magistrate observed that the driving arrangement appeared to be a car pool, not directed or requested by the employer. Consequently, the employer was not responsible for the safety compliance of the vehicle used in that car pool.

The case in *Saintide v. Trye*, 783 F. Supp. 1368 (S.D. Fla. 1992), arose due to a serious traffic accident that injured several migrant workers riding in a vehicle driven by an unregistered farm labor contractor. Due to the failure by the farm labor contractor to carry proper insurance on the vehicle, the injured workers were unable to obtain medical care or lost wages compensation. The farm labor contractor (employer) who had employed the unregistered farm labor contractor asserted he was not responsible for the 29 U.S.C. § (b) (1) (C) vehicle violations because he didn't actually employ the migrant workers. The judge reached a different conclusion and indicated that "an employer is found to have caused the transportation of harvest workers by a farm labor contractor when this transportation is a 'necessary element in obtaining the workers to harvest the grower's crop'..." *Id.* at 1373. Specifically, the court believed the transportation of the workers was a necessary element because: a) the workers relied on the farm labor contractor for their transportation; b) few of the workers had their own vehicles; c) public transportation was unavailable; and, d) without employer-provided transportation, the crop would not have been harvested. As a result, the farm labor contractor (employer) had caused the transportation of the migrant workers and was thus liable under the Act for the vehicle violations.

In its closing brief, Zappalla Farms presents two points to refute the notion that a "necessity of transportation" rationale exists to render an agricultural employer liable for a farm labor contractor's vehicle. First, the facts in the *Saintide* case are sufficiently different such that its legal theory is inapplicable in Zappalla Farms' situation. In *Saintide*, the employer was providing transportation through the farm labor contractor; whereas Zappalla Farms clearly established that Mr. Perez, and not Zappalla Farms, was responsible for transportation. Further, the workers in *Saintide* had to rely on the farm labor contractor's vehicle in the absence of their own cars. In contrast, the workers at Zappalla Farms were able to use some of their own vehicles, such as Mr. Freddy Roblero's van, to get to work. Finally, the cited violation in *Saintide* related to the failure to provide insurance as required under 29 U.S.C. § 1841 (b) (1) (C) and 29 C.F.R. §§ 500.121 and 500.122. Notably, the Zappalla Farms citation involves 29 U.S. C § 1841 (b) (1) (A) and 29 C.F.R. § 500.70 (c), failure to

ensure compliance with vehicle safety standards.

These factual distinctions are not particularly determinative. Granted, by their contract terms, Mr. Perez, and not Zappalla Farms, was responsible for transportation. However, Zappalla Farms did indirectly fund the transportation through its enhanced compensation for Mr. Perez to cover transportation costs. Next, although early in the 1995 growing season the workers had access to other workers' vehicles, by mid-summer through July 5, 1995, the Zappalla Farms workers were no longer able to use Mr. Freddy Roblero's van such that just as the workers in *Saintide*, with the exception of Mr. Freddy Roblero himself, they did have to rely exclusively on Mr. Perez's vehicles to get to the Zappalla Farms' onion fields. Finally, 29 C.F.R. § 500.70 (c) indicates that whoever uses, or causes to be used, vehicles for migrant farm worker transportation, that person is responsible "for compliance with the motor vehicle safety and insurance provisions of section 401 of the Act and §§ 500.100 through 500.128." In *Saintide* the associated regulatory provisions were 29 C.F.R. §\$ 500.121 and 122. However, as noted by the quoted text, 29 C.F.R. § 500.70 (c) also draws in 29 C.F.R. § 500.104 which contains the secured seating and overloading limit provisions.

Second, and significantly, Zappalla Farms observes that the court holding in *Saintide* directly conflicts with the statute and regulation. Since farms are not usually near suitable mass transit, under the *Saintide* theory, an agricultural grower would always be responsible for the workers' transportation. However, 29 C.F.R. § 500.70 (c), specifically states that "these regulations do not impose responsibility on an agricultural employer. . .for a farm labor contractor's failure to adhere to the safety provisions provided in these regulations when the farm labor contractor is providing the vehicles and directing their use." The only stated regulatory exception to this language is if the agricultural employer specifically directs or requests the farm labor contractor to use the farm labor contractor's vehicle to carry out a task for the agricultural employer. Upon consideration of this point, and since the judge in *Saintide* did not address this particular regulation provision, I agree the *Saintide* holding and the language of 29 C.F.R. § 500.70 (c) are in sufficient conflict to preclude reliance on the "necessity of transportation" rational to find that Zappalla Farms caused the transportation of workers to its fields.

Joint Employer

The other liability basis I relied upon in the Preliminary Decision and Order was the concept of joint employer. The principle case I cited for that proposition is *Ricketts v. Vann*, 32 F.3d 71 (4th Cir. 1994). In that case, a watermelon grower had hired a farm labor contractor to provide migrant workers for his harvest. The court rejected the joint employer concept to hold the grower liable for the workers' transportation-related injuries because: a) the grower only leased the farm property; b) the grower did not provide housing; c) the grower gave no day-to-day instructions and exerted no supervision over the workers; and, d) the farm labor contractor provided all the supervision, set the pay rates, and kept the pay records.

In another case I referenced in my initial decision, *Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 191 (1999), the court did conclude that the farm operator was a joint

employer based on several factors (*see* 29 C.F.R. § 500.20 (h) (5)). As a joint employer, the farm operator was liable for a farm labor contractor's failure to obtain proper vehicle insurance as required by 29 U.S.C. § 1841 (b) (1) (C). *Id.* at 1335.

In response to these judicial holdings that attach responsibility for transportation vehicles to an agricultural employer who also happens to be a joint employer of the migrant workers, Zappalla Farms makes two specific distinctions. First, although Zappalla Farms acknowledges it was a joint employer for some purposes, such as pay, workers' compensation and housing, the language of 29 C.F.R. § 500.70 (c) specifically excludes joint employer liability for the agricultural employer for the safety violations of the farm labor contractor's vehicles unless the agricultural employer directs, or requests their use. The Since Zappalla Farms did not direct or request Mr. Perez to accomplish any of its agricultural employer tasks, the partnership is entitled to the regulatory exclusion which states an agricultural employer is not responsible for a farm labor contractor's failure to adhere to the regulation's safety provisions.

Second, Zappalla Farms observes that neither *Ricketts* nor *Charles* provide a basis for imposing liability on Zappalla Farms for <u>safety</u> violations because both two courts discussed joint employer liability associated with failures in the specific areas of vehicle <u>recording keeping</u> (29 U.S.C. § 1821) and <u>insurance</u> requirements (29 C.F.R.§ 1841 (b) (1) (C)), rather than vehicle <u>safety</u> standards (29 U.S.C. § 1841 (b) (1) (A)), the cited violation in Zappalla Farms' case and a category of violation that is specifically excluded in 29 C.F.R. § 500.70 (c).⁴⁸ Thus, Zappalla Farms, even if held to be a joint employer, is not responsible for the unsafe condition of Mr. Perez's vans.

Zappalla Farms' reliance on the specific language of 29 C.F.R. § 500.70 (c) as a bar to any liability for the unsafe conditions of Mr. Perez's two vans is certainly understandable. The essential rational for Zappalla Farms' case against liability for the unsafe vehicles is that the regulation, 29 C.F.R. § 500.70(c), treats vehicle safety requirements, such as secured seating and load limits, separately from, and differently than, the other vehicle requirements including insurance and licensing. This apparent regulatory distinction is important to Zappalla Farms because *Charles* court addressed imposing liability on the agricultural employer, as a joint employer, only in the areas of insurance and licensing. ⁴⁹

However, considering the statute's broad proscription at 29 U.S.C. § 1841 (b) (1) more

⁴⁷Zappalla Farms does not object to joint employer status. Based on the extensive employment relationship Zappalla Farms had with the migrant workers, including supervision, pay, housing, and workers' compensation, coupled with the integral importance of the workers to the Zappalla Farms' production, I find Zappalla Farms was the joint employer of the migrant workers in Mr. Perez's crew during summer of 1995. *See* 29 C.F.R. § 500.20 (h) (5) (iv).

⁴⁸I note that one of the cited alleged violations in *Ricketts* was 29. U.S.C. § 1841 (b) (1) (A). *Ricketts*, 32 F.3d at 75. However, as previously discussed, the court determined the grower was not a joint employer and consequently didn't address the issue before me.

⁴⁹The *Charles* court was not presented with the issue of whether such liability also extended to the unsafe condition of the vehicles.

controlling than the ambiguous 29 C.F.R. § 500.70 (c), and in light of the stated basis in *Charles* for holding an agricultural employer, as a joint employer, responsible for vehicle requirements, I find Zappalla Farms, as a joint employer, caused unsafe vehicles to be used. Accordingly, as explained below, Zappalla Farms is liable for the associated vehicle safety violations of the white and blue vans.

According to the Act, Section 401 (b) (1), 29 U.S.C. § 1841 (b) (1), an agricultural employer causing a vehicle to be used for migrant worker transportation must ensure the vehicle's compliance in three areas. The vehicle must meet safety standards prescribed by the Secretary's regulations, Federal authorities, and State authorities, 29 U.S.C. § 1841 (b) (1) (A). The driver of the vehicle must have a valid and appropriate driver's license, 29 U.S.C. § 1841 (b) (1) (B). And, the vehicle must have insurance or a bond to provide coverage for damage to persons associated with operation of the vehicle, 29 U.S.C. § 1841 (b) (1) (C). Importantly from my perspective, although this portion of the statute divides these requirements into three distinct subparagraphs of vehicle safety standards, licensing and insurance, the title of the main paragraph, Section 1841 is "Motor vehicle safety." In other words, though safety standards, licensing and insurance are discussed separately, all three requirements fall under the Act's rubric of "motor vehicle safety," indicating that all three factors are important in ensuring that safe transportation is provided to the migrant workers.

While the statute is fairly clear that all three elements are essential to motor vehicle safety, the implementing regulation does appear to take a different approach. Entitled, "Transportation related protections," 29 C.F.R. § 500.70 (c) uses the term, "safety" as something apart from the insurance requirements. Specifically, the regulation states the person causing the vehicle to be used is responsible "for motor vehicle <u>safety</u> and <u>insurance</u> provisions of section 401 of the Act and §§ 500.100 through 500.128 of these regulations" (emphasis added). After exempting car pool arrangements from the mandate of 29 C.F.R. § 500.70 (c), the regulation then states in regard to only the "<u>safety</u> provisions provided in these regulations," (emphasis added) absent a specific direction or request from the agricultural employer, the agricultural employer is not responsible for "a farm labor contractor's failure to adhere to the <u>safety</u> provisions provided in these regulations" (emphasis added).

This regulatory distinction between safety and insurance requirements in 29 C.F.R. § 500.70 (c) becomes somewhat ambiguous upon considering the remaining portion of the paragraph. 29 C.F.R. § 500.70 (c) goes on to impose on the agricultural employer, who does becomes involved in the workers' transportation through direction or requests, joint responsibility for the safety, insurance and health provisions. Since an involved agricultural employer is responsible for safety and insurance standards, correspondingly shouldn't an uninvolved agricultural employer be insulated from both safety and insurance requirements? I consider the regulation's silence in that regard somewhat

⁵⁰Because Mr. Perez, the farm labor contractor, was actively involved in the use of the white van and blue van for worker transportation, that transportation is not considered a car pool. *See* 29 C.F.R. § 500.103 (c). As a result, the car pool exemption to the requirements of 29 C.F.R. § 500.70 (c) is not applicable to the white and blue vans.

confusing since it implies, without specifically stating, that the uninvolved agricultural employer who neither directed nor requested the transportation, while exempt from liability for vehicle safety, would still be responsible for the insurance requirements of the farm labor contractor's vehicles.

Even if the regulation were clearer, the Act is unambiguous and specific. As highlighted above, the statute clearly considers vehicle safety standards, insurance and licensing equally important elements of motor vehicle safety. If Zappalla Farms' restrictive interpretation of 29 C.F.R. § 500.70 (c) were correct, then the Act's purpose of providing safe vehicles for the transportation of migrant farm workers would be diminished. According to Zappalla Farms' position, the exemption in 29 C.F.R. § 500.70 (c) means holding an agricultural employer, who is also a joint employer, responsible only for proper vehicle insurance, without any responsibility for the vehicle's compliance with safety standards, will sufficiently protect migrant farm workers. However, under that Act, compliance with vehicle safety standards is an important, if not greater, factor in protecting migrant farm workers during their transportation to and from their work. To the extent that 29 C.F.R. § 500.70 (c) provides otherwise, I find the Act's language controlling. In light of the Charles' court emphasis on the broad protective purpose of the Act, migrant workers are best protected by holding an agricultural employer, who is a joint employer, responsible for all three components of motor vehicle safety established by 29 U.S.C. § 401 (b) (1): insurance, licensing, and safety standards compliance. Accordingly, as a joint employer of the migrant farm workers riding in its farm labor contractor's blue and white vans, Zappalla Farms is jointly responsible with Mr. Perez for the unsafe conditions of the vehicles.

Civil Monetary Penalties

Having determined that Zappalla Farms bears liability for Mr. Perez's use of the unsafe white and blue vans, I next review the appropriateness of the assessed civil monetary penalties of \$17,000.

Zappalla Farms asserts the amount of the penalty is improperly computed due to the per worker assessment. Noting that the civil cause of action provision, 29 U.S.C. § 1854 (c) (1), specifically authorizes damages based on per plaintiff (worker) per violation, Zappalla Farms highlights the absence of any "per worker" language in the civil monetary penalties section, 29 U.S.C. § 1853 (a) (1). As a result, the maximum civil monetary penalty for the cited violation for two vans would be \$2,000.

In my discussion of Mr. Perez' penalty for his use of unsafe vans, I have already determined that the penalty may be imposed on a per worker basis, especially considering the on-going nature of the violations. At the same time, other factors as set out in 29 U.S.C. § 500.143 (b) (1) to (7) need to be reviewed.

Some factors of mitigation are present in Zappalla Farms' case. The record contains no evidence of any previous history of violations of the Act by Zappalla Farms. Further, as established by the testimony of Mr. James Zappalla, 1995 represented a singular departure from Zappalla Farms' usual practice of providing transportation for its workers. Zappalla Farms had little experience with

the type of arrangement presented by DeMay Labor and workers' car pooling. Additionally, following the tragic accident, Zappalla Farms resumed providing proper transportation for its workers, demonstrating the company's commitment to future compliance with the Act's mandate for safe transportation of migrant workers.

On the other hand, other aspects of this case serve as aggravation. Most notably, the unsafe condition of the blue van led to the tragic accident of July 5, 1995 which cost Mr. Alberto Gonzalez, Mr. Andres Escalante, and Mr. Dagoberto Roblero-Vasquez their lives and grievously injured several other workers. Significantly, this case does not involve a remote, unknowing, agricultural employer who supervised from a distance and is being unfairly held responsible for the malfeasance of its farm labor contractor. Instead, at least one member of the Zappalla Farms partnership, Mr. Sam Zappalla, had extensive involvement with the migrant workers in the onion fields and was certainly aware of the unsafe condition of the vans in terms of seating and overcrowding. On the last few days before the accident, Mr. Zappalla was in a position to see almost the entire work crew arrive and depart the fields in one blue van. Beyond advising them to not over load the van, he did nothing further. Counsel for Zappalla Farms has suggested that greater involvement by Mr. Zappalla may have exposed Zappalla Farms to unintended legal consequences in regards to the workers' car pooling. However, Zappalla Farms also needed workers in its onion fields and did little to stop them despite its knowledge of the vehicles' unsafe conditions. Further, as the sole provider of the workers' income, with the corresponding economic leverage, Zappalla Farms was in a position to have halted the obvious unsafe transport of the migrant farm workers on overturned buckets in a grievously overloaded cargo van before Mr. Amilcar Roblero wrapped the blue van around a tree on July 5, 1995.

On balance, the grievous consequences of the cited violations, associated with the number of workers harmfully affected, outweigh the mitigation considerations. Accordingly, I find the Administrator did not abuse her discretion in assessing a civil monetary penalty of \$17,000 against Zappalla Farms for the use of two unsafe vans in the transportation of migrant farm workers.

Issue No. 7 - Use of Mr. Nemias Perez Without Confirmation of Registration for Transporting and Driving Migrant Workers - Zappalla Farms

Section 402 of the Act, 29 U.S.C. § 1842, and the associated regulation, 29 C.F.R. § 500.71, prohibits a person from utilizing the services of a farm labor contractor without first taking reasonable steps to determine that the farm labor contractor possesses a valid certificate of registration for that activity. A person may make such a reasonable determination by reviewing the certificate of registration or confirming the registration with the Department of Labor.

On August 16, 1995, the Administrator imposed a \$1,000 civil monetary penalty on Zappalla Farms for utilizing the services of an unregistered farm labor contractor without determining that he possessed a certificate of registration of the activities of driving and transporting migrant workers (AD 44). The citation also referenced Violation Number 16.

In my Preliminary Decision and Order, because I found Zappalla Farms had caused the transportation of migrant workers, I concluded Zappalla Farms had also utilized Mr. Perez, without determining his registration, to drive and transport workers. Zappalla Farms denies liability for this violation because it did not know Mr. Perez was driving or transporting the workers. Upon reconsideration, I find only one of the two cited charges remains valid.

Based on the parties' arrangement at the beginning of the growing season, Mr. Perez was neither to drive nor transport the workers. At Zappalla Farms' insistence, the agreement also included a provision concerning the licensing of Mr. Perez. If, in order to meet his obligation to provide workers to the fields, Mr. Perez provided the transportation, he would have to obtain the appropriate registration and licensing. For the first part of the season, the alternative contract provision was not invoked because the workers' car pooling appeared to work. Mr. Perez arrived to work separately in his own vehicle and was not participating in the workers' transportation. However, that transportation arrangement eventually fell apart due to vehicle problems and Mr. Freddy Roblero's refusal to carry other workers. Eventually, both DeMay Labor and Zappalla Farms became aware of Mr. Perez's transportation woes but left the solution to him. By July 1995, as the workers, including Mr. Perez, arrived and departed in one van, the situation was circumstantially sufficient to conclude, in light of Mr. Perez's responsibility for getting the workers to the onion fields, that he was now providing transportation to the fields. Despite this observable change in the workers' transportation, at least one member of the Zappalla Farms partnership, Mr. Sam Zappalla, did not inquire whether Mr. Perez had complied with his contractual obligation to obtain the proper registration. Thus, the cited violation in regards to the transportation of migrant workers is established.

I reach a different conclusion concerning the driving citation. Although Mr. Perez indicated that at times he drove the van to the fields, the record is insufficient to prove that any member of Zappalla Farms was aware he had become a driver. Due to that factual deficiency, the portion of the citation relating to driving the farm workers should be reversed (dismissed).

Concerning the amount of the penalty, two of the three underlying charges (unregistered housing and driving) have been dismissed. Counsel for the Administrator asserts that a \$1,000 penalty is appropriate for even one of the underlying charges. I disagree and also find some mitigation is appropriate. Notably, in its initial agreement with Mr. Perez and DeMay Labor, Zappalla Farms demonstrated sensitivity to, and an understanding of, the administrative requirements of registering Mr. Perez for farm labor activities involving transportation of workers. As a result, I conclude the cited violation in this case resulted from a failure to fulfill a recognized administrative obligation rather than a complete disregard for the registration requirements for farm labor contractors. Based on these considerations, and the dismissal of two-thirds of the reasons for the cited violation, I consider a \$300 penalty appropriate.

Issue No. 8 - Housing Standards - Zappalla Farms

Section 203 (a) of the Act, 29 U.S.C. § 1823 (a), and 29 C.F.R. § 500.70 (d) make the owner

of a facility used to house migrant workers responsible for that facility's compliance with Federal safety and health standards, as partially specified in 29 C.F.R. §§ 500.130 to 135.

Because the trailer on Pollard Road, owned by Zappalla Farms, and used by Mr. Perez, did not have a requisite certificate of occupancy permit as required by 29 C.F.R. § 500.135 (b), the Administrator imposed a civil monetary penalty of \$200, referencing Violation Number 12 (AD 44).

In the Preliminary Decision and Order, I dismissed a violation against Zappalla Farms alleging the company used Mr. Perez to house migrant workers. In light of that dismissal, Zappalla Farms now asserts it can not be held liable for this stated housing violation. Counsel for the company also observes that Zappalla Farms did not authorize Mr. Perez to house migrant workers in its trailer and took efforts to convince Mr. Perez to stop the practice.

Based on the language of both the statute and regulation, Zappalla Farms' obligation in regards to the housing requirements is based solely on its status as the owner of the property and imposes strict liability. Various courts have upheld that type of responsibility and I see no basis for departing from the line of cases.⁵¹ As stipulated, Zappalla Farms owned the Pollard Road trailer which Mr. Perez used, authorized or not, to house migrant workers. Because the trailer did not have the requisite occupancy certificate, a violation is established.

Concerning the amount of the penalty, the Form WH-15 lists a penalty of up to \$1,000 for this type of violation. However, due to the absence of any serious health problem, the Administrator imposed only \$200 (Ms. Quinn's testimony). In considering the various factors concerning the size of penalty, I believe further relief (for purposes of principal rather than any realistic monetary value) is warranted. As an agricultural employer, Zappalla Farms, was both well aware of its obligations in housing migrant farm workers and, as inspections of its two labor camps demonstrated, met those housing responsibilities. In fact, the DOL investigators found the two labor camps in good condition and noted no violations. Zappalla Farms further demonstrated its commitment to compliance with the housing regulations by renting the Pollard Road trailer to Mr. Perez for his use only. His subsequent housing of a few migrant workers was not authorized. When Zappalla Farms became aware of the situation, it attempted to correct the problem through Mr. DeMay, and then eventually imposed economic disincentives on Mr. Perez. Due to Zappalla Farms' demonstrated compliance with housing standards, the aberrational, unauthorized use of the Zappalla Farms' trailer by Mr.

⁵¹In *Barrientos v. Taylor*, 917 F.Supp. 375 (E.D.N.C. 1996) the court held the owner of a house occupied by a migrant worker responsible for the Act's posting requirements regardless of the owner's status as an agricultural employer. Similarly, the court in *Howard v. Malcolm*, 629 F.Supp. 952 (E.D.N.C. 1986) found an owner liable for compliance with housing standards without requiring an employment relationship. Finally, the court in *Conlan v. U.S. Dept. of Labor*, 76 F.3d 271 (9th Cir. 1996) *cert. denied* 117 S.Ct. 431 (1996) upheld the application of strict liability. The court correspondingly observed strict liability would not be imposed only if the owner, or any of his or her representatives, did not provide the housing, and he or she was not aware of its unauthorized use by migrant workers. *Id* at 275.

Perez, and Zappalla Farms' pre-investigation attempts to correct the discrepancy, I consider a of reduction of the penalty down to \$20 an appropriate administrative response to the Pollard Road housing violation.

ORDER

In light of my findings of fact and conclusions of law, and in accordance with 29 C.F.R. § 500.262 (e):

- 1. The Assessment of Civil Monetary Penalty, dated August 16, 1995, against the Respondent **MR. NEMIAS PEREZ-ROBLERO**:
 - A. For violations of Sections 101 (a), 102 (3), and 203 (a), relating to the housing of migrant farm workers, the penalty in the total amount of \$600.00 is **AFFIRMED**;
 - B. For violations of Sections 101 (a) and 102 (2), relating to the transportation of migrant farm workers, the penalty in the total amount of \$1,000 is **MODIFIED** to \$400.00;
 - C. For a violation of Section 401 (b) (1) (A), relating to ensuring a driver has the proper license, both the stated violation and the penalty of \$200.00 are **REVERSED**;
 - D. For two violations of Section 101 (b), relating to the use of unregistered farm labor contractor employees to transport migrant farm workers, the penalty in the total amount of \$600.00 is **AFFIRMED**; and,
 - E. For multiple violations of Section 401 (b) (1) (A), relating to the use of two vans without sufficient secured seating for each occupant and in excess of design weight, the penalty in the total amount of \$16,000.00 is **AFFIRMED**.
- 2. The Assessment of Civil Monetary Penalty, dated August 16, 1995, against the Respondent JAMES R. ZAPPALLA, JOHN R. ZAPPALLA, AND SAMUEL C. ZAPPALLA, individually, and as partners in a partnership d/b/a ZAPPALLA FARMS:
 - A. For multiple violations of Section 401 (b) (1) (A), relating to the use of two vans without sufficient secured seating for each occupant and in excess of design weight, the penalty in the total amount of \$17,000.00 is **AFFIRMED**.

- B. For one violation of Sections 402, relating to the failure to confirm Mr. Perez's registration to drive migrant farm workers, the violation is **REVERSED**;
- C. For one violation of Sections 402, relating to the failure to confirm Mr. Perez's registration to transport migrant farm workers, the penalty in the total amount of \$1,000.00 is **MODIFIED** to \$300.00; and
- D. For a violation of Section 203 (a), relating to the failure to ensure a facility housing migrant workers complied with Federal standards, the penalty in the total amount of \$200.00 is **MODIFIED** to \$20.00.

SO ORDERED:

A RICHARD T. STANSELL-GAMM Administrative Law Judge

Date Signed: March 14, 2003

Washington, D.C.

NOTICE: Any party may petition the Administrative Review Board for issuance of a Notice of Intent to modify or vacate this decision as described in 29 C.F.R. § 500.263. The petition must be filed within twenty days of the date of this decision with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington D.C. 20210. *See* 29 C.F.R. §§ 500.263 and 500.264. The AdministrativReview Board has been delegated authority and assigned responsibility to act for the Secretary of Labor in issuing final agency decisions on questions of law and fact arising in review or on appeal of ALJ decisions under the Migrant and Seasonal Agricultural Workers Protection Act. *See* Secretary's Order 2-96, 61 Fed. Reg. 19978 (1996).